Dec 12 1871

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~300~~ 110

GEORGE ALEXANDER, PLAINTIFF IN ERROR,

vs.

M. ROULET, WHEELER MARTIN, J. P FULLER, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

aff

Land Case

FILED NOVEMBER 23, 1870.

Jan 16 1872

SUPREME COURT OF THE UNITED STATES.

No. 309.

GEORGE ALEXANDER, PLAINTIFF IN ERROR,

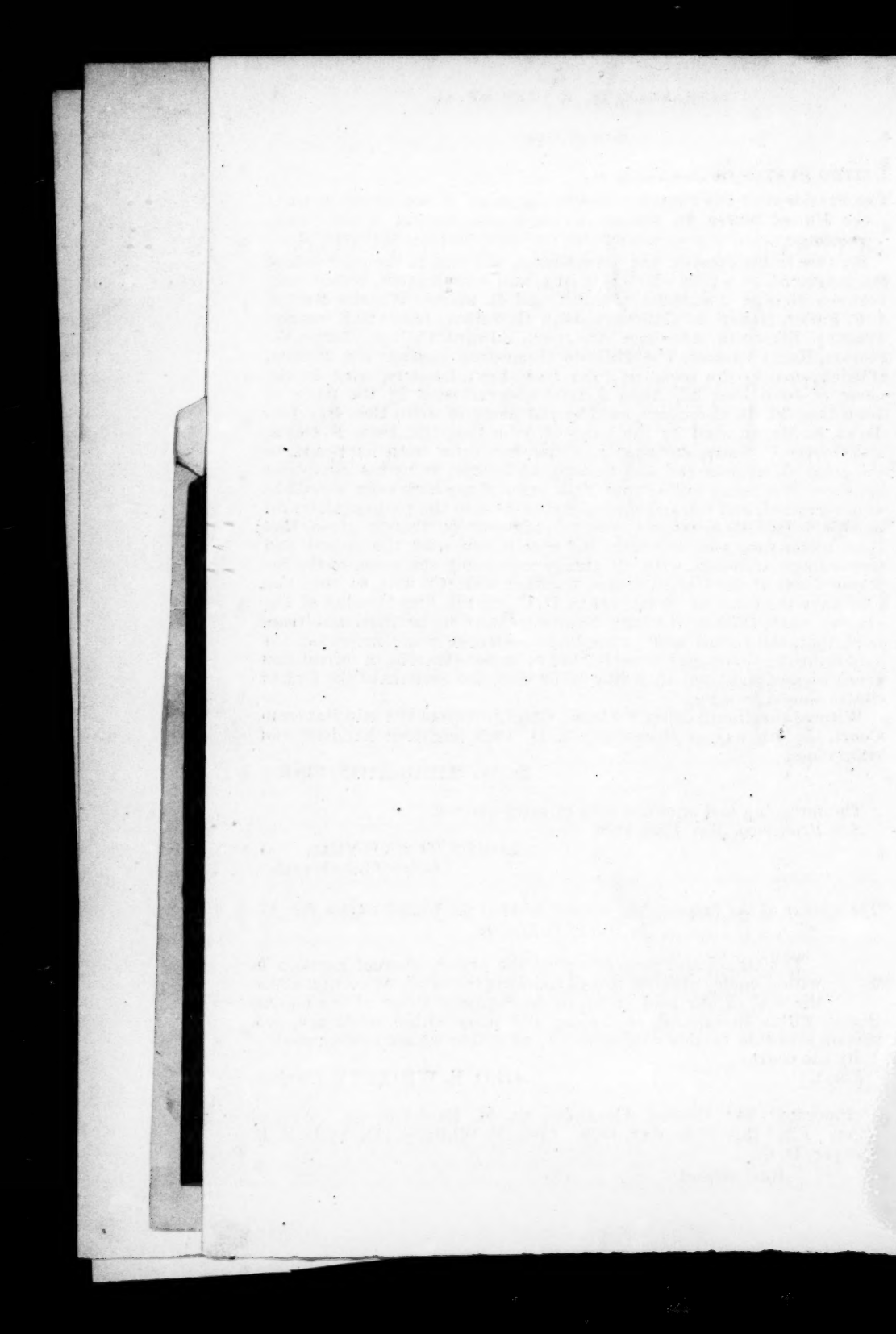
vs.

M. ROULET, WHEELER MARTIN, J. P. FULLER, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print.
Writ of error	a	1
Answer of Anderson, Abraham	80	28
Cromer, Henry	33	12
Ellsworth, Timothy	111	40
Fuller, J. P.	53	19
Gullixson, Henry A.	19	8
Hillside Homestead Association, The	93	33
Kennedy, James S.	5	3
Landers, John	40	14
Lindenberger, Anna J.	100	36
Martin, Wheeler	67	24
Mayer, F. K.	124	44
Mayer, William J.	118	42
Nelson, John G.	60	21
O'Brien, Michael	47	17
Phillips, Edward	74	26
Rogers, R. K.	87	31
Simson, James W.	26	10
John G. Nelson and Henry A. Gullixson	12	5
Davis and Sharp	106	38
Bond on appeal	140	50
Citation	142	51
Complaint	1	2
Findings	130	46
Judgment	136	49



a *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judge of the circuit court of the United States for the ninth circuit and district of California, greeting:

Because in the records and proceedings, and also in the rendition of the judgment, of a plea which is in the said circuit court, before you, between George Alexander, plaintiff, and M. Roulet, Wheeler Martin, J. P. Fuller, Henry A. Gallixson, John G. Nelson, James S. Kennedy, Timothy Ellsworth, Abraham Anderson, Edward Phillips, James W. Simson, Henry Cromer, The Hillside Homestead Association, Michael O'Brien, sued by the name of John Doe, John Landers, sued by the name of John Doe, 2d, Anna J. Lindenberger, sued by the name of John Doe, 3d, R. R. Rogers, sued by the name of John Doe, 4th, Frederick K. Mayer, sued by the name of John Doe, 5th, Isaac E. Davis, and George F. Sharp, defendants, a manifest error hath happened, to the great damage of the said George Alexander, as by his complaint appears: We, being willing that *if* the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, D. C., on the first Monday of December next, 1870, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the said Supreme Court, the 4th day of December, A. D. 1869, (eighteen hundred and sixty-nine.)

D. W. MIDDLETON, *Clerk.*

The foregoing and annexed writ of error allowed.
San Francisco, May 12th, 1870.

LORENZO SAWYER,
Judge of 9th Circuit.

The answer of the judges of the circuit court of the United States for the district of California.

The record and proceedings of the plaint, whereof mention is
b within made, with all things touching the same, we certify, under the seal of our said court, to the Supreme Court of the United States within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[SEAL.] GEO. E. WHITNEY, *Clerk.*

(Indorsed:) 582. George Alexander vs. M. Roulet et als. Writ of error. Filed this 12th May, 1870. Geo. E. Whitney, cl'k, by L. S. B. Sawyer, D. C.

1 *Complaint.*

In the circuit court of the United States in and for the district of California.

GEORGE ALEXANDER, PLAINTIFF,
vs.
M. ROULET, M. ROULET, GEORGE W. BEAVER, J. S. Kennedy, Foster B. Tarbett, Thomas E. Lindenberger, A. Anderson, H. E. Gallixon, John G. Nelson, W'm E. Moody, J. P. Fuller, E. Phillips, Timothy Ellsworth, Wheeler Martin, C. L. Newman, Henry Cromer, Henry Kromer, J. W. Simpson, J. W. Simson, W. Dohaney, C. McDermott, W'm J. Mayer, William Hollis, Hillside Homestead Association, D. W. Perley, Alvinza Hayward, Thomas Bell, Leonce Girard, Isaac E. Davis, George F. Sharp, Father Maraschi, John Carroll, Trustees of the Jesuit College of Santa Clara, Bishop Alemany, Hugh P. Gallagher, John Doe, Richard Roe, John Doe, jr., Richard Roe, jr., John Doe, 2nd, Richard Roe, 2nd, John Doe 3d, Richard Roe 3d, John Doe, 4th, Richard Roe, 4th, John Doe, 5th,
2 Richard Roe, 5th, John Doe, 6th, Richard Roe, 6th, John Doe, 7th, Richard Roe, 7th, John Doe, 8th, Richard Roe, 8th, John Doe, 9th, Richard Roe, 9th, John Doe, 10th, Richard Roe, 10th, John Doe, 11th, Richard Roe, 11th, John Doe, 12th, Richard Roe, 12th, John Doe, 13th, Richard Roe, 13th, John Doe, 14th, Richard Roe, 14th, John Doe, 15th, Richard Roe, 15th, John Doe, 16th, Richard Roe, 16th, John Doe, 17th, Richard Roe, 17th, John Doe, 18th, Richard Roe, 18th, John Doe, 19th, Richard Roe, 19th, John Doe, 20th, Richard Roe, 20th, defendants.

State of California, April 14th, 1868.

The above-named plaintiff, George Alexander, brings this action against the above-named defendants, and shows to the court and avers that plaintiff is a resident and citizen of the city and county of New York, and State of New York; that defendants are each citizens and residents of the State of California, and of said judicial district; that defendants The Hillside Homestead Association and The Trustees of
3 the Jesuit College of Santa Clara are each corporations created and organized under the laws of the State of California, and having their principal places of business in the city and county of San Francisco, in said State and judicial district.

And for a cause of action against defendants, plaintiff avers and shows to the court that on the tenth day of April, 1868, plaintiff was, and still is, the owner and entitled to the possession and was in possession of the following-described piece and parcel of land situate in the city and county of San Francisco, State of California, and particularly described as follows, to wit: Commencing at the southwesterly corner of the tract of land in the city and county of San Francisco, granted by the

former Mexican authorities to Francisco Guerrero, and known by the name of El Suerto en Dolores; thence running south 81¾° west 16.85½ chains; thence north 8¼° west 16 chains 85½ links; thence north 81¾° east 16 chains 85½ links; thence south 8¼° east 16 chains 85½ links, to the place of beginning; that said piece and parcel of land is of the value of five thousand dollars and upwards; that afterwards and on or about the 12th day of April, 1868, defendants wrongfully and unlawfully, and against the will of plaintiff, entered upon and into pos-
4 session of said lands and premises, have ever since, against the will of plaintiff, continued in possession thereof, and have, against the will of plaintiff, detained and witheld possession of said premises from plaintiff, and still do obtain and withold possession thereof from plaintiff.

Whereupon plaintiff prays the following judgment and relief:

That plaintiff be adjudged to be the owner and entitled to the possession of the hereinbefore-described premises, and that possession thereof be restored to plaintiff, with costs of this action.

W'M H. PATTERSON,
Attorney for Plaintiff.

(Endersed:) Filed April 14th, 1868. Geo. E. Whitney, cl'k, by S. Neall, D. C.

5 *Answer of def't James S. Kennedy.*

United States circuit court, district of California.

GEORGE ALEXANDER *vs.* M. ROULET AND OTHERS. } Answer of James S. Kennedy, defendant.

I. James S. Kennedy, one of the defendants in the above-entitled action, for his first separate answer to the plaintiff's complaint herein denies that, on the 10th day of April, 1868, or at any time, the plaintiff was, or is, either the owner or entitled to the possession of, or ever was, in possession of, the piece or parcel of land described in the complaint, or of any part thereof; and denies that, on or about the said 12th day of April, or at any time, this defendant wrongfully or unlawfully entered upon or into possession of said lands or premises, or of any part thereof, and denies that he has ever at any time detained or witheld, or that he does withold or detain the said lands, or any part thereof, from the said plaintiff; or that he is, or that he ever was at any
6 time, in possession of any part of said premises except the following-described parcel thereof, to wit:

All that certain lot or parcel of land, situate in the city and county of San Francisco, State of California, bounded and described as follows, viz: Commencing at a point on the northwesterly line of Market street, distant one hundred and forty (140) feet southwesterly from the corner formed by the intersection of the northwesterly line of Market street with the southerly line of Sparks street; thence southwesterly along said line of Market street fifty (50) feet; thence at right angles northwesterly one hundred and fifteen (115) feet; thence at right angles northeasterly fifty (50) feet; and thence at right angles southeasterly one hundred and fifteen (115) feet, to the point of beginning, being a portion of Mission Block, No. 102. And he admits that on the 10th day of April, 1868, and long prior thereto, he was, and still is, in pos-

session of said last-described parcel of the premises described in the complaint, and alleged that long prior to said 10th day of April, 1868, he was, and is, seized in fee, and the owner and lawfully entitled to the possession of the same.

7 II. And for a second further separate answer to said plaintiff's complaint this defendant denies each and all of the allegations thereof, except such as are hereinafter specially admitted. He admits that prior to and on said 10th day of April, A. D. 1868, he was, and ever since has been, and is, in the possession of a certain piece and parcel of the premises, which said piece and parcel is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for that purpose solely. And he alleges that on, and long prior to, the said 10th day of April, 1868, he was, and has ever since been, and is, seized in fee, and the owner, and entitled to the possession of said last above-described piece and parcel of said premises.

III. And for a third further separate answer to the plaintiff's complaint this defendant alleges that this defendant and those under whom he claims and derives his possession and rights in and to the last-described lands, parcel as aforesaid, entered into possession of a certain parcel of the said lands described in the said complaint under a claim of title, exclusive of any other right, founding such claim upon a certain written instrument as being a conveyance of the said last-de-

8 scribed lands, parcel as aforesaid, and of other lands; the date and names of the grantors and grantees in said conveyance are as follows, namely:

Date July 13th, A. D. 1853, (1853;) grantor, James R. Bolton; grantee, George W. Wright.

And that the said adverse possession of the said last-described lands, parcel as aforesaid, under the said adverse claim of title, existed, and continued without interruption for five years last before the commencement of this action—

1. By having and keeping the said parcel usually cultivated and improved;

2. By having and keeping the said parcel protected by a substantial enclosure;

3. By using the said parcel for the supply of fuel;

4. By using the said parcel for the supply of fencing timber for the purpose of husbandry; and

5. By employing the said parcel for the ordinary use of the occupant—which said last-mentioned piece and parcels of lands is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description and for no other purpose.

That neither the plaintiff, his ancestors, predecessors, or grantors has had the actual possession of the said parcel, or of any part thereof,

9 at any time within five years next before the commencement of this action.

IV. And for a further fourth separate answer this defendant avers that this action was not commenced within one year after a certain act of the legislature of the State of California, approved March 4th, 1864, and entitled "An act to limit the time for the commencement of civil actions in certain cases," took effect; that this action is brought for the recovery of real property, and for the possession thereof, situated in the said city and county of San Francisco; and that said real property was, and is, above the natural high-water mark of the bay of San Francisco, as the same existed at the time of the admission of California into the

Union as a State, and is situated within the corporate limits of the city of San Francisco, as defined in the act to incorporate said city, passed April 15th, 1851, and is not within any of the exceptions made by a certain act of the legislature of said State, approved March 11th, 1858, and entitled an "Act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of said city," by which exception certain lands were excluded from the
10 operation of said last-named act.

V. And for a further fifth separate answer to the plaintiff's complaint in this action this defendant alleges that he, and those under whom he claims, have been in the actual, quiet, and peaceable occupancy and possession, exclusive of any other right, and adversely to the plaintiff, and to all other persons, for more than five years next before the commencement of this action—

1. By having and keeping the same protected by a substantial enclosure; and

2. By having and keeping the same usually cultivated and improved—of a certain other parcel of the lands described in the complaint in this action, which said certain other parcel is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for no other purpose.

VI. And for a further sixth separate answer to said plaintiff's complaint this defendant denies each and all the allegations of said complaint.

E. B. MASTICK,
Attorney for the Defendant named in the preceding answers.
JOHN W. DWINELLE, *of Counsel.*

11 (Endorsed:)

Service of a copy of the within answer admitted this 5th day of September, 1868.

PATTERSON, WALLACE & STOW,
Attorneys for Plaintiff.

Filed Sept. 5th, 1868.

GEO. E. WHITNEY, *Clerk*,
By H. F. LARDNER, *D. C.*

12 *Answers of def'ts John G. Nelson and Henry A. Gullixson.*

United States circuit court, district of California.

GEORGE ALEXANDER *vs.* M. ROULET AND OTHERS. } Answers of John G. Nelson and Henry A. Gullixson, defendants.

I. John G. Nelson and Henry A. Gullixson, two of the defendants in the above-entitled action, for their first separate answer to the plaintiff's complaint herein, deny that, on the 10th day of April, 1868, or at any time, the plaintiff was, or is, either the owner, or entitled to the possession of, or ever was in possession of, the piece or parcel of land described in the complaint, or of any part thereof; and deny that, on or about the said 12th day of April, or at any time, these defendants wrongfully or unlawfully entered upon or into possession of said lands or premises, or of any part thereof; and deny that they have ever at any time detained

or witheld, or that they do withold or detain the said lands, or any part thereof, from the said plaintiff; or that they are, or that they ever
13 were at any time, in possession of any part of said premises, except the following-described parcel thereof, to wit:

All that certain lot or parcel of land situate, lying, and being in the city and county of San Francisco, State of California, bounded and described as follows, viz: Commencing at a point in the westerly line of Noe street, distant one hundred and thirty (130) feet southerly from the southwesterly corner of Noe and Sparks streets; thence running southerly along the westerly line of Noe street one hundred (100) feet, to the northerly line of Beaver street; thence at right angles westerly along the northerly line of Beaver street one hundred and ten (110) feet; thence at right angles northerly one hundred (100) feet; and thence at right angles easterly one hundred and ten (110) feet, to the point of beginning, being a portion of Mission Block, No. 117.

And they admit that, on the 10th day of April, 1868, and long prior thereto, they were and still are in possession of said last-described parcel of the premises described in the complaint, and allege that long prior to said 10th day of April, 1868, they were, and are, seized in fee and the owners, and lawfully entitled to the possession of the same.

14 II. And for a second further separate answer to said plaintiff's complaint these defendants deny each and all of the allegations thereof, except such as are hereinafter specially admitted. They admit that prior to and on said 10th day of April, A. D. 1868, they were, and ever since have been, and are, in the possession of a certain piece and parcel of the premises, which said piece and parcel is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for that purpose solely.

And they allege that on, and long prior to, the said 10th day of April, 1868, they were, and have ever since been, and are, seized in fee and the owners, and entitled to the possession of said last above-described piece and parcel of said premises.

III. And for a third further separate answer to the plaintiff's complaint these defendants alleges that these defendants and those under whom they claim and derive their possession and rights in and to the last-described lands, parcel as aforesaid, entered into possession of a certain parcel of the said lands described in the said complaint,
15 under a claim of title, exclusive of any other right, founding such claim upon a certain written instrument as being a conveyance of the said last-described lands, parcel as aforesaid, and of other lands; the date and names of the grantor and grantees in said conveyance are as follows, namely:

Date, July 13th, A. D. 1853; grantor, James R. Bolton; grantee, George W. Wright.

And that the said adverse possession of the said last-described lands, parcel as aforesaid, under the said adverse claim of title, existed and continued without interruption for five years last before the commencement of this action—

1. By having and keeping the said parcel usually cultivated and improved;

2. By having and keeping the said parcel protected by a substantial enclosure;

3. By using the said parcel for the supply of fuel;

4. By using the said parcel for the supply of fencing timber for the purpose of husbandry; and

5. By employing the said parcel for the ordinary use of the occupant—which said last-mentioned piece and parcel of lands is particularly described in the preceding first separate answer, reference being had
16 thereto for the purpose of said description, and for no other purpose.

That neither the plaintiff, his ancestors, predecessors, or grantors, has had the actual possession of the said parcel, or of any part thereof, at any time within five years next before the commencement of this action.

IV. And for a further fourth separate answer these defendants aver that this action was not commenced within one year after a certain act of the legislature of the State of California, approved March 4th, 1864, and entitled "An act to limit the time for the commencement of civil actions in certain cases," took effect; that this action is brought for the recovery of real property, and for the possession thereof, situated in the said city and county of San Francisco; and that said real property was, and is, above the natural high-water mark of the bay of San Francisco, as the same existed at the time *at the time* of the admission of California into the Union as a State, and is situated within the corporate limits of the city of San Francisco as defined in the act to incorporate said city, passed April 15th, 1851, and is not within any of the exceptions made by a certain act of the legislature of said State, approved March
17 11th, 1858, and entitled an "Act concerning the city of San Francisco and to ratify and confirm certain ordinances of the common council of said city," by which exception certain lands were excluded from the operation of said last-named act.

V. And for a further fifth separate answer to the plaintiff's complaint in this action these defendants allege that they, and those under whom they claim, have been in the actual, quiet, and peaceable occupancy and possession, exclusive of any other right, and adversely to the plaintiff, and to all other persons, for more than five years next before the commencement of this action—

1. By having and keeping the same protected by a substantial enclosure; and

2. By having and keeping the same usually cultivated and improved—of a certain other parcel of the lands described in the complaint in this action, which said certain other parcel is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for no other purpose.

VI. And for a further sixth separate answer to said plaintiff's
18 complaint these defendants deny each and all the allegations of said complaint.

E. B. MASTICK,
Attorney for the Defendants named in the preceding answers.
JOHN W. DWINELLE, *of Counsel.*

(Endorsed:)

Service of a copy of the within answer admitted this 5th day of September, 1868.

PATTERSON, WALLACE AND STOW,
Attorneys for Plaintiff.

Filed Sept. 5th, 1868.

GEO. E. WHITNEY, *Clerk*,
By H. F. LARDNER, *D. C.*

19 *Answer of def't Henry A. Gullixson.*

United States circuit court, district of California.

GEORGE ALEXANDER *vs.* M. ROULET AND OTHERS. } Answer of Henry A. Gullixson, defendant.

I. Henry A. Gullixson, one of the defendants in the above-entitled action, for his first separate answer to the plaintiff's complaint herein, denies that, on the 10th day of April, 1868, or at any time, the plaintiff was, or is, either the owner or entitled to the possession of, or ever was in possession of, the piece or parcel of land described in the complaint, or of any part thereof; and denies that, on or about the said 12th day of April, or at any time, this defendant wrongfully or unlawfully entered upon or into possession of said lands or premises, or of any part thereof; and denies that he has ever at any time detained or withheld, or that he does withold or detain, the said lands, or any part thereof, from the said plaintiff; or that he is, or that he ever was at any time, in possession of any part of said premises, except the following-described parcel thereof, to wit:

20 All that certain piece or parcel of land situate in the city and county of San Francisco, State of California, bounded and described as follows, viz: Commencing at a point on the northwesterly line of Market street, distant two hundred and ninety (290) feet southwesterly from the corner formed by the intersection of the northwesterly line of Market street with the southerly line of Sparks street; thence southwesterly along said line of Market street fifty (50) feet; thence at right angles northwesterly one hundred and fifteen (115) feet; thence at right angles northeasterly fifty (50) feet; and thence at right angles southeasterly one hundred and fifteen feet to the point of commencement, being portion of Mission Block, number 102. And he admits that, on the 10th day of April, 1868, and long prior thereto, he was, and still is, in possession of said last-described parcel of the premises described in the complaint, and alleges that long prior to said 10th day of April, 1868, he was, and is, seized in fee, and the owner, and lawfully entitled to the possession of the same.

II. And for a second further separate answer to said plaintiff's
21 complaint this defendant denies each and all of the allegations thereof, except such as are hereinafter specially admitted. He admits that prior to and on said 10th day of April, A. D. 1868, he was, and ever since has been, and is, in the possession of a certain piece and parcel of the premises, which said piece and parcel is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for that purpose solely. And he alleges that, on and long prior to the said 10th day of April, 1868, he was, and has ever since been, and is, seized in fee, and the owner, and entitled to the possession of said last above-described piece and parcel of said premises.

III. And for a third further separate answer to the plaintiff's complaint this defendant alleges that this defendant, and those under whom he claims and derives his possession and rights in and to the last-described lands, parcel as aforesaid, entered into possession of a certain parcel of the said lands described in the said complaint, under a claim of title, exclusive of any other right, founding such claim upon a certain written instrument as being a conveyance of the said

22 last-described lands, parcel as aforesaid, and of other lands; the date and names of the grantor and grantees in said conveyance are as follows, namely:

Date, July 13th, A. D. 1853; grantor, James R. Bolton; grantee, George W. Wright.

And that the said adverse possession of the said last-described lands, parcel as aforesaid, under the said adverse claim of title, existed and continued without interuption for five years last before the commencement of this action—

1. By having and keeping the said parcel usually cultivated and improved;

2. By having and keeping the said parcel protected by a substantial enclosure;

3. By using the said parcel for the supply of fuel;

4. By using the said parcel for the supply of fencing timber for the purpose of husbandry; and

5. By employing the said parcel for the ordinary use of the occupant—which said last-mentioned piece and parcel of lands is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for no other purpose.

That neither the plaintiff, his ancestors, predecessors, or grantors, has had the actual possession of the said parcel, or of any part
23 thereof, at any time within five years next before the commencement of this action.

IV. And for a further fourth separate answer this defendant avers that this action was not commenced within one year after a certain act of the legislature of the State of California, approved March 4th, 1864, and entitled "An act to limit the time for the commencement of civil actions in certain cases," took effect; that this action is brought for the recovery of real property, and for the possession thereof, situated in the said city and county of San Francisco; and that said real property was, and is, above the natural high-water mark of the bay of San Franciso, as the same existed at the time of the admission of California into the Union as a State; and is situated within the corporate limits of the city of San Francisco, as defined in the act to incorporate said city, passed April 15th, 1851, and is not within any of the exceptions made by a certain act of the legislature of said State, approved March 11th, 1858, and entitled "An act concerning the city of San Francisco and to ratify and confirm certain ordinances of the common council of said city," by which exception certain lands were excluded from the operation of said last-named act.

24 V. And for a further fifth separate answer to the plaintiff's complaint in this action this defendant alleges that he, and those under whom he claims, have been in the actual, quiet, and peacable occupancy and possession, exclusive of any other right, and adversely to the plaintiff, and to all other persons, for more than five years next before the commencement of this action—

1. By having and keeping the same protected by a substantial enclosure; and

2. By having and keeping the same usually cultivated and improved—

of a certain other parcel of the lands described in the complaint in this action, which said certain other parcel is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for no other purpose.

VI. And for a further sixth separate answer to said plaintiff's com-

plaint this defendant denies each and all the allegations of said complaint.

E. B. MASTICK,
Attorney for the Defendant named in the preceding answers.
JOHN W. DWINELLE, *of Counsel.*

25 Service of a copy of the within answer admitted this 5th day of September, 1868.

PATTERSON WALLACE AND STOW,
Attorneys for Plaintiff.

Filed Sept. 5th, 1868.

GEO. E. WHITNEY, *Clerk*,
By H. F. LARDNER, *D. C.*

26 *Answer of J. W. Simson.*

United States circuit court, district of California.

GEORGE ALEXANDER *vs.* M. ROULET AND OTHERS. } Answer of James W. Simson, defendant.

I. James W. Simson, one of the defendants in the above-entitled action, for his first separate answer to the plaintiff's complaint herein, denies that, on the 10th day of April, 1868, or at any time, the plaintiff was, or is, either the owner or entitled to the possession of, or ever was in possession of, the piece or parcel of land described in the complaint, or of any part thereof; and denies that, on or about the said 12th day of April, or at any time, this defendant wrongfully or unlawfully entered upon or into possession of said lands or premises, or of any part thereof; and denies that he has ever at any time detained or witheld, or that he does withold or detain, the said lands, or any part thereof, from the said plaintiff; or that he is, or that he ever was at any time, in possession of any part of said premises, except the following-described parcel
27 thereof, to wit:

All that certain piece or parcel of land situate in the city and county of San Francisco, State of California, bounded and described as follows, viz: Commencing at a point in the southerly line of Sparks street, distant fifty (50) feet easterly from the southeasterly corner of Sparks and Noe streets; thence easterly along the southerly line of Sparks street fifty (50) feet; thence at right angles southerly one hundred and twenty-five (125) feet; thence at right angles westerly fifty (50) feet; and thence at right angles northerly one hundred twenty-five (125) feet to the point of commencement, being a portion of Mission Block, No. 102. And he admits that, on the 10th day of April, 1868, and long prior thereto, he was, and still is, in possession of said last-described parcel of the premises described in the complaint, and alleges that long prior to said 10th day of April, 1868, he was, and , seized in fee, and the owner, and lawfully entitled to the possession of the same.

II. And for a second further separate answer to said plaintiff's complaint this defendant denies each and all of the allegations
28 thereof, except such as are hereinafter specially admitted. He admits that prior to and on said 10th day of April, A. D. 1868, he was, and ever since has been, and is, in the possession of a certain piece and parcel of the premises, which said piece and parcel is particularly

described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for that purpose solely. And he alleges that, on and long prior to the said 10th day of April, 1868, he was, and has ever since been, and is, seized in fee, and the owner, and entitled to the posession of said last above-described piece and parcel of said premises.

III. And for a third further separate answer to the plaintiff's complaint this defendant alleges that this defendant, and those under whom he claims and derives his possession and rights in and to the last-described lands, parcel as aforesaid, entered into possesson of a certain parcel of the said lands described in the said complaint, under a claim of title, exclusive of any other right, founding such claim upon a certain written instrument as being a conveyance of the said last-described lands, parcel as aforesaid, and of other lands; the date and names
29 of the grantor and grantees in said conveyance are as follows, namely:

Date, July 13th, A. D. 1853; grantor, James R. Bolton; grantee, George W. Wright.

And that the said adverse possession of the said last-described lands, parcel as aforesaid, under the said adverse claim of title, existed and continued without interruption for five years last before the commencement of this action—

1. By having and keeping the said parcel usually cultivated and improved;

2nd. By having and keeping the said parcel protected by a substantial enclosure;

3d. By using the said parcel for the supply of fuel;

4th. By using the said parcel for the supply of fencing timber for the purpose of husbandry; and—

5th. By employing the said parcel for the ordinary use of the occupant—

which said last-mentioned piece and parcel of lands is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for no other purpose.

That neither the plaintiff, his ancestors, predecessors, or grantors, has had the actual possession of the said parcel, or of any part thereof,
30 at any time within five years next before the commencement of this action.

IV. And for a further fourth separate answer this defendant avers that this action was not commenced within one year after a certain act of the legislature of the State of California, approved March 4th, 1864, and entitled "An act to limit the time for the commencement of civil actions in certain cases," took effect; that this action is brought for the recovery of real property, and for the possession thereof, situated in the said city and county of San Francisco; and that said real property was, and is, above the natural high-water mark of the bay of San Francisco, as the same existed at the time of the admission of California into the Union as a State, and is situated within the corporate limits of the city of San Francisco, as defined in the act to incorporate said city, passed April 15th, 1851, and is not within any of the exceptions made by a certain act of the legislature of said State, approved March 11th, 1858, and entitled "An act concerning the city of San Francisco and to ratify and confirm certain ordinances of the common council of said city," by which exception certain lands were excluded from the operation of said last-named act.

31 V. And for a further fifth separate answer to the plaintiff's

ery of real property, and for the possession thereof, situated in the said city and county of San Francisco; and that said real property was, and is, above the natural high-water mark of the bay of San Francisco, as the same existed at the time of the admission of California into the Union as a State, and is situated within the corporate limits of the city of San Francisco, as defined in the act to incorporate said city, passed April 15th, 1851, and is not within any of the exceptions made by a certain act of the legislature of said State, approved March 11th, 1858, and entitled "An act concerning the city of San Francisco and to ratify and confirm certain ordinances of the common council of said
38 city," by which exception certain lands were excluded from the operation of said last-named act.

V. And for a further fifth separate answer to the plaintiff's complaint in this action this defendant alleges that he, and those under whom he claims, have been in the actual, quiet, and peaceable occupancy and possession, exclusive of any other right, and adversely to the plaintiff, and to all other persons, for more than five years next before the commencement of this action—

1. By having and keeping the same protected by a substantial enclosure; and

2. By having and keeping the same usually cultivated and improved—of a certain other parcel of the lands described in the complaint in this action, which said certain other parcel is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for no other purpose.

VI. And for a further sixth separate answer to said plaintiff's complaint this defendant denies each and all the allegations of said complaint.

39 E. B. MASTICK,
Attorney for the Defendant named in the preceding answers.
JOHN W. DWINELLE, *of Counsel.*

(Endorsed:)

Service of a copy of the within answer admitted this 5th day of September, 1868.

PATTERSON, WALLACE AND STOWE,
Attorneys for Plaintiff.

Filed Sept. 5th, 1868.

GEO. E. WHITNEY, *Clerk*,
By H. F. LARDNER, *D. C.*

40 *Answer of John Landers.*

United States circuit court, district of California.

GEORGE ALEXANDER *vs.* M. ROULET AND OTHERS. } Answer of John Landers, defendant.

I. John Landers, one of the defendants in the above-entitled action, for his first separate answer to the plaintiff's complaint herein, denies that, on the 10th day of April, 1868, or at any time, the plaintiff was, or is, either the owner or entitled to the possession of, or ever was in possession of, the piece or parcel of land described in the complaint, or of any part thereof; and denies that, on or about the said 12th day of

April, or at any time, this defendant wrongfully or unlawfully entered upon or into possession of said lands or premises, or of any part thereof; and denies that he has ever at any time detained or witheld, or that he does withold or detain, the said lands, or any part thereof, from the said plaintiff; or that he is, or that he ever was at any time, in possession of any part of said premises, except the following-described parcel thereof, to wit:

41 All that certain lot or parcel of land situate in the city and county of San Francisco, State of California, bounded and described as follows, viz: Commencing at a point in the northwesterly line of Market street, distant ninety (90) feet southwesterly from the corner formed by the intersection of the northwesterly line of Market street with the southerly line of Sparks street; thence southwesterly along said line of Market street fifty (50) feet; thence at right angles northwesterly one hundred and fifteen (115) feet; thence at right angles northeasterly five feet five and one-half inches (5 5½) to the southerly line of Sparks street; thence easterly along said line of Sparks street fifty-eight feet six and three-quarter inches, (58 6¾;) and thence southeasterly seventy-six feet eleven and one-quarter inches to the point of commencement, being portion of Mission Block, No. 102.

And he admits that, on the 10th day of April, 1868, and long prior thereto, he was, and still is, in possession of said last-described parcel of the premises described in the complaint, and alleges that long prior to said 10th day of April, 1868, he was, and is, seized in fee, and

42 the owner, and lawfully entitled to the possession of the same.

II. And for a second further separate answer to said plaintiff's complaint this defendant denies each and all of the allegations thereof, except such as are hereinafter specially admitted. He admits that prior to and on said 10th day of April, A. D. 1868, he was, and ever since has been, and is, in the possession of a certain piece and parcel of the premises, which said piece and parcel is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for that purpose solely. And he alleges that, on and long prior to the said 10th day of April, 1868, he was, and has ever since been, and is, seized in fee, and the owner, and entitled to the possession of said last above-described piece and parcel of said premises.

III. And for a third further separate answer to the plaintiff's complaint this defendant alleges that this defendant, and those under whom he claims and derives his possession and rights in and to the last-described lands, parcel as aforesaid, entered into possession of

43 a certain parcel of the said lands described in the said complaint, under a claim of title, exclusive of any other right, founding such claim upon a certain written instrument as being a conveyance of the said last-described lands, parcel as aforesaid, and of other lands; the date and names of the grantor and grantees in said conveyance are as follows, namely:

Date, July 13th, A. D. 1853; grantor, James R. Bolton; grantee, George W. Wright.

And that the said adverse possession of the said last-described lands, parcel as aforesaid, under the said adverse claim of title, existed and continued without interruption for five years last before the commencement of this action—

1. By having and keeping the said parcel usually cultivated and improved;

2. By having and keeping the said parcel protected by a substantial enclosure;

3. By using the said parcel for the supply of fuel;

4. By using the said parcel for the supply of fencing timber for the purpose of husbandry; and

5. By employing the said parcel for the ordinary use of the occupant—

which said last-mentioned piece and parcel of lands is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for no other purpose.

44

That neither the plaintiff, his ancestors, predecessors, or grantors, has had the actual possession of the said parcel, or of any part thereof, at any time within five years next before the commencement of this action.

IV. And for a further fourth separate answer this defendant avers that this action was not commenced within one year after a certain act of the legislature of the State of California, approved March 4th, 1864, and entitled "An act to limit the time for the commencement of civil actions in certain cases," took effect; that this action is brought for the recovery of real property, and for the possession thereof, situated in the said city and county of San Francisco; and that said real property was, and is, above the natural high-water mark of the bay of San Francisco, as the same existed at the time of the admission of California into the Union as a State, and is situated within the corporate limits of the city of San Francisco, as defined in the act to incorporate said city, passed April 15th, 1851, and is not within any of the exceptions made by a certain act of the legislature of said State, approved March 11th, 1858, and entitled an "Act concerning the city of San Francisco and to ratify and confirm certain ordinances of the common council of said city," by which exception certain lands were excluded from the operation of said last-named act.

45

V. And for a further fifth separate answer to the plaintiff's complaint in this action this defendant alleges that he, and those under whom he claims, have been in the actual, quiet, and peaceable occupancy and possession, exclusive of any other right, and adversely to the plaintiff, and to all other persons, for more than five years next before the commencement of this action—

1. By having and keeping the same protected by a substantial enclosure;

2. By having and keeping the same usually cultivated and improved—

of a certain other parcel of the lands described in the complaint in this action, which said certain other parcel is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description and for no other purpose.

VI. And for a further sixth separate answer to said plaintiff's complaint this defendant denies each and all the allegations of said complaint.

46

E. B. MASTICK,
Attorney for the Defendant in the preceding answers.

JOHN W. DWINELLE, *of Counsel.*

(Endorsed:)

Service of copy of the within answer admitted this 5th day of September, 1868.

PATTERSON WALLACE AND STOW,
Attorneys for Plaintiff.

Filed Sept. 5th, 1868.

GEO. E. WHITNEY, *Clerk*,
By H. F. LARDNER, *D. C.*

Answer of Michael O'Brien.

47 United States circuit court, district of California.

GEORGE ALEXANDER
vs.
M. ROULET AND OTHERS. } Answer of Michael O'Brien, defendant.

I. Michael O'Brien, one of the defendants in the above-entitled action, for his first separate answer to the plaintiff's complaint herein, denies that, on the 10th day of April, 1868, or at any time, the plaintiff was, or is, either the owner or entitled to the possession of, or ever was in possession of, the piece or parcel of land described in the complaint, or of any part thereof; and denies that, on or about the said 12th day of April, or at any time, this defendant wrongfully or unlawfully entered upon or into possession of said lands or premises, or of any part thereof; and denies that he has ever at any time detained or witheld, or that he does withold or detain, the said lands, or any part thereof, from the said plaintiff; or that he is, or that he ever was at any time, in possession of any part of said premises, except the following-
48 described parcel thereof, to wit:

All that certain piece or parcel of land situate, lying, and being in the city and county of San Francisco, State of California, bounded and described as follows, viz: Commencing at the southwesterly corner of Sparks and Noe streets; thence running westerly along the southerly line of Sparks street one hundred and ten (110) feet; thence at right angles southerly thirty (30) feet; thence at right angles easterly one hundred and ten (110) feet to the westerly line of Noe street; and thence northerly along the westerly of Noe street thirty (30) feet to the point of beginning, being part of Mission Block, No. 117.

And he admits that, on the 10th day of April, 1868, and long prior thereto, he was, and still is, in possession of said last-described parcel of the premises described in the complaint, and alleges that long prior to said 10th day of April, 1868, he was, and is, seized in fee, and the owner, and lawfully entitled to the possession of the same.

II. And for a second further separate answer to said plaintiff's complaint this defendant denies each and all of the allegations thereof, except such as are hereinafter specially admitted. He admits that, prior to and on said 10th day of April, A. D. 1868, he was, and ever has
49 been, and is, in the possession of a certain piece and parcel of the premises, which said piece and parcel is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for that purpose solely. And he alleges that, on and long prior to the said 10th day of April, 1868, he was, and has ever since been, and is, seized in fee, and the owner, and entitled to the possession of said last above-described piece and parcel of said premises.

III. And for a third further seperate answer to the plaintiff's complaint this defendant alleges that this defendant, and those under whom he claims and derives his possession and rights in and to the last-described lands, parcel as aforesaid, entered into possession of a certain parcel of the said lands described in the said complaint, under a claim

of title, exclusive of any other right, founding such claim upon a certain written instrument as being a conveyance of the said last-described lands, parcel as aforesaid, and of other lands; the date and names of the grantor and grantees in said conveyance are as follows, namely:

Date, July 13th, A. D. 1853; grantor, James R. Bolton; grantee, George W. Wright.

50 And that the said adverse possession of the said last-described lands, parcel as aforesaid, under the said adverse claim of title, existed and continued without interruption for five years last before the commencement of this action—

1. By having and keeping the said parcel usually cultivated and improved;

2. By having and keeping the said parcel protected by a substantial enclosure;

3. By using the said parcel for the supply of fuel;

4. By using the said parcel for the supply of fencing timber for the purpose of husbandry; and

5. By employing the said parcel for the ordinary use of the occupant—

which said last-mentioned piece or parcel of lands is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for no other purpose.

That neither the plaintiff, his ancestors, predecessors, or grantors, has had the actual possession of the said parcel, or any part thereof, at any time within five years next before the the commencement of this action.

IV. And for a further fourth separate answer this defendant

51 avers that this action was not commenced within one year after a certain act of the legislature of the State of California, approved March 4th, 1864, and entitled "An act to limit the time for the commencement of civil actions in certain cases," took effect; that this action is brought for the recovery of real property, and for the possession thereof, situated in the said city and county of San Francisco; and that said real property was, and is, above the natural high-water mark of the bay of San Francisco, as the same existed at the time of the admission of California into the Union as a State, and is situated within the corporate limits of the city of San Francisco, as defined in the act to incorporate said city, passed April 15th, 1851, and is not within any of the exceptions made by a certain act of the legislature of said State, approved March 11th, 1858, and entitled "An act concerning the city of San Francisco and to ratify and confirm certain ordinances of the common council of said city," by which exception certain lands were excluded from the operation of said last-named act.

V. And for a further fifth separate answer to the plaintiff's complaint in this action this defendant alleges that he, and those under

52 whom he claims, have been in the actual, quiet, and peaceable occupancy and possession, exclusive of any other right, and adversely to the plaintiff, and to all other persons, for more than five years next before the commencement of this action—

1. By having and keeping the same protected by a substantial enclosure; and

2. By having and keeping the same usually cultivated and improved—

of a certain other parcel of the lands described in the complaint in this action, which said certain other parcel is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for no other purpose.

VI. And for a further sixth separate answer to said plaintiff's com-

plaint this defendant denies each and all the allegations of said complaint.

E. B. MASTICK,
Attorney for the Defendant named in the preceding answers.

JOHN H. DWINELLE, *of Counsel.*

(Endorsed:)

Service of a copy of the within answer admitted this 5th day of September, 1868.

PATTERSON, WALLACE AND STOW,
Attorneys for Plaintiff.

Filed Sept. 5th, 1868.

GEO. E. WHITNEY, *Clk*,
By H. F. LARDNER, *D. C.*

53 *Answer of J. P. Fuller.*

United States circuit court, district of California.

GEORGE ALEXANDER *vs.* M. ROULET AND OTHERS. } Answer of J. P. Fuller, defendant.

I. J. P. Fuller, one of the defendants in the above-entitled action, for his first separate answer to the plaintiff's complaint herein, denies that, on the 10th day of April, 1868, or at any time, the plaintiff was, or is, either the owner or entitled to the possession of, or ever was in possession of, the piece or parcel of land described in the complaint, or of any part thereof; and denies that, on or about the said 12th day of April, or at any time, this defendant wrongfully or unlawfully entered upon or into possession of said lands or premises, or of any part thereof; and denies that he has ever at any time detained or withheld, or that he does withold or detain, the said lands, or any part thereof, from the said plaintiff; or that he is, or that he ever was, at any time, in possession of any part of said premises, except the following-described parcel
54 thereof, to wit:

All that certain lot or parcel of land situated in the city and county of San Francisco, State of California, bounded and described as follows, viz: Commencing at a point in the southeasterly line of Market street, distant eighty-three feet four inches (83 4) southwesterly from the corner formed by the intersection of the southeasterly line of Market street with the westerly line of Sanchez street; thence southwesterly along the southeasterly line of Market street twenty-five feet eight inches; thence running at right angles southeasterly to the southerly line of the lands in said complaint described; thence easterly along the southerly line of the lands in said complaint described to a point in said last-mentioned line where it is intersected by a line drawn at right angles to Market street, at the point of commencement; thence northwesterly to the point of commencement, being part of Mission Block, No. 103. And he admits that, on the 10th day of April, 1868, and long prior thereto, he was, and still is, in possession of said last-described parcel of the premises described in the complaint, and alleges that long prior to said 10th day of April, 1868, he was, and is, seized in fee,
55 and the owner, and lawfully entitled to the possession of the same.

II. And for a second further separate answer to said plaintiff's complaint this defendant denies each and all of the allegations thereof, except such as are hereinafter specially admitted. He admits that, prior to and on said 10th day of April, A. D. 1868, he was, and ever since has been, and is, in the possession of a certain piece and parcel of the premises, which said piece and parcel is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for that purpose solely.

And he alleges that, on and long prior to the said 10th day of April, 1868, he was, and has ever since been, and is, seized in fee, and the owner, and entitled to the possession of said last above-described piece and parcel of said premises.

III. And for a third further separate answer to the plaintiff's complaint this defendant alleges that this defendant, and those under whom he claims and derives his possession and rights in and to the last described lands, parcel as aforesaid, entered into possession of a
56 certain parcel of the said lands described in the said complaint, under a claim of title, exclusive of any other right, founding such claim upon a certain written instrument, as being a conveyance of the said last-described lands, parcel as aforesaid, and of other lands; the date and names of the grantor and grantees in said conveyance are as follows, namely:

Date, July 13th, A. D. 1853; grantor, James R. Bolton; grantee, George W. Wright.

And that the said adverse possession of the said last-described lands, parcel as aforesaid, under the said adverse claim of title, existed and continued without interruption for five years last before the commencement of this action—

1. By having and keeping the said parcel usually cultivated and improved;

2. By having and keeping the said parcel protected by a substantial enclosure;

3. By using the said parcel for the supply of fuel;

4. By using the said parcel for the supply of fencing timber for the purpose of husbandry; and,

5. By employing the said parcel for the ordinary use of the occupant—
57 which said last-mentioned piece and parcel of lands is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for no other purpose.

That neither the plaintiff, his ancestors, predecessors, or grantors, has had the actual possession of the said parcel, or of any part thereof, at any time within five years next before the commencement of this action.

IV. And for a further fourth separate answer this defendant avers that this action was not commenced within one year after a certain act of the legislature of the State of California, approved March 4th, 1864, and entitled "An act to limit the time for the commencement of civil actions in certain cases," took effect; that this action is brought for the recovery of real property, and for the possession thereof, situated in the said city and county of San Francisco; and that said real property was, and is, above the natural high-water mark of the bay of San Francisco, as the same existed at the time of the admission of California into the Union as a State, and is situated within the corporate limits of the city of San Francisco, as defined in the act to incorporate said city, passed April 15th, 1851, and is not within any of the exceptions made by

58 a certain act of the legislature of said State, approved March 11th, 1858, and entitled "An act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of said city," by which exception certain lands were excluded from the operation of said last-named act.

V. And for a further fifth separate answer to the plaintiff's complaint in this action this defendant alleges that he, and those under whom he claims, have been in the actual, quiet, and peaceable occupancy and possession, exclusive of any other, right, and adversely to the plaintiff, and to all other persons, for more than five years next before the commencement of this action—

1. By having and keeping the same protected by a substantial enclosure; and,

2. By having and keeping the same usually cultivated and improved—

of a certain other parcel of the lands described in this action, which said certain other parcel is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for no other purpose.

59 VI. And for a further sixth separate answer to said plaintiff's complaint this defendant denies each and all the allegations of said complaint.

E. B. MASTICK,
Attorney for the Defendant named in the preceding answers.

JOHN W. DWINELLE, *of Counsel.*

(Endorsed:)

Service of a copy of the within answer admitted this 5th day of August, 1868.

PATTERSON, WALLACE AND STOW,
Attorneys for Plaintiffs.

Filed Sept. 5th, 1868.

GEO. E. WHITNEY, *Clerk*,
By H. F. LARDNER, *D. C.*

60 *Answer of John G. Nelson.*

United States of America, district of California.

GEORGE ALEXANDER *vs.* M. ROULET AND OTHERS. } Answer of John G. Nelson, defendant.

I. John G. Nelson, one of the defendants in the above-entitled action, for his first separate answer to the plaintiff's complaint herein, denies that, on the 10th day of April, 1868, or at any time, the plaintiff was, or is, either the owner or entitled to the possession of, or ever was in possession of, the piece or parcel of land described in the complaint, or of any part thereof; and denies that, on or about the said 12th day of April, or at any time, this defendant wrongfully or unlawfully entered upon or into possession of said lands or premises, or of any part thereof; and denies that he has ever at any time detained or witheld, or that he does withhold or detain, the said lands, or any part thereof, from the said plaintiff; or that he is, or that he ever was at any time, in

61 possession of any part of said premises, except the following-described parcel thereof, to wit:

All that certain piece or parcel of land situate in the city and county of San Francisco, State of California, bounded and described as follows, viz: Commencing at a point in the northwesterly line of Market street, distant three hundred and forty (340) feet southwesterly from the corner formed by the intersection of the northwesterly line of Market street with the southwesterly line of Sparks street; thence at right angles northwesterly one hundred and fifteen (115) feet; thence at right angles southwesterly fifty (50) feet; thence at right angles southeasterly to the southerly line of the premises in said complaint described; thence easterly along the southerly line of the premises in said plaintiff's complaint described, to the northwesterly line of Market street; and thence northeasterly along said line of Market street to the point of commencement, being portion of Mission Block, number 102.

And he admits that, on the 10th day of April, 1868, and long prior thereto, he was, and still is, in possession of, said last-described parcel of the premises described in the complaint, and alleges that long
62 prior to said 10th day of April, 1868, he was, and is, seized in fee, and the owner, and lawfully entitled to the possession of the same.

II. And for a further second separate answer to said plaintiff's complaint this defendant denies each and all the allegations thereof, except such as are hereinaftar specially admitted. He admits that, prior to and on said 10th day of April, A. D. 1868, he was, and ever since has been, and is, in the possession of a certain piece and parcel of the premises, which said piece and parcel is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for that purpose solely. And he alleges that, on and long prior to the said 10th day of April, 1868, he was, and has ever since been, and is, seized in fee, and the owner, and entitled to the possession of said last above-described piece and parcel of said premises.

III. And for a third further separate answer to the plaintiff's complaint this defendant alleges that this defendant, and those under whom he claims and derives his possession and rights in and to the
63 last-described lands, parcel as aforesaid, entered into possession of a certain parcel of the said lands described in the said complaint, under a claim of title, exclusive of any other right, founding such claim upon a certain written instrument, as being a conveyance of the said last-described lands, parcel as aforesaid, and other lands; the date and names of the grantors and grantees in said conveyance are as follows, namely:

Date, July 13th, A. D. 1853; grantor, James R. Bolton; grantee, George W. Wright.

And that the said adverse possession of the said last-described lands, parcel as aforesaid, under the said adverse claim of title, existed and continued without interruption for five years last before the commencement of this action—

1. By having and keeping the said parcel usually cultivated and improved;

2. By having and keeping the said parcel protected by a substantial enclosure;

3. By using the said parcel for the supply of fuel;

4. By using the said parcel for the supply of fencing timber for the purpose of husbandry; and

5. By employing the said parcel for the ordinary use of the occupant—

64 which said last-mentioned piece and parcel of lands is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for no other purpose.

That neither the plaintiff, his ancestors, predecessors, or grantors, has had the actual possession of the said parcel, or of any part thereof, at any time within five years next before the commencement of this action.

IV. And for a fourth separate answer this defendant avers that this action was not commenced within one year after a certain act of the legislature of the State of California, approved March 4th, 1864, and entitled "An act to limit the time for the commencement of civil actions in certain cases," took effect; that this action is brought for the recovery of real property, and for the possession thereof, situated in the said city and county of San Francisco; and that said real property was, and is, above the natural high-water mark of the bay of San Francisco, as the same existed at the time of the admission of California into the Union as a State, and is situated within the corporate limits of the city of San Francisco, as defined in the act to incorporate said city, passed April 15th, 1851, and is not within any of the exceptions made
65 by a certain act of the legislature of said State, approved March 11th, 1858, and entitled "An act concerning the city of San Francisco and to ratify and confirm certain ordinances of the common council of said city," by which exception certain lands were excluded from the operation of said last-named act.

V. And for a further fifth separate answer to the plaintiff's complaint in this action this defendant alleges that he, and those under whom he claims, have been in the actual, quiet, and peaceable occupancy and possession, exclusive of any other right, and adversely to the plaintiff, and to all other persons, for more than five years next before the commencement of this action—

1. By having and keeping the same protected by a substantial enclosure; and

2. By having and keeping the same usually cultivated and improved—of a certain other parcel of the lands described in the complaint in this action, which said certain other parcel is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for no other purpose.

VI. And for a further sixth separate answer to said plaintiff's
66 complaint this defendant denies each and all the allegations of said complaint.

E. B. MASTICK,
Attorney for the Defendant named in the preceding answers.
JOHN W. DWINELLE, *of Counsel.*

(Endorsed:)

Service of a copy of the within answer admitted this 5th day of September, 1868.

PATTERSON, WALLACE & STOW,
Attorneys for Plaintiff.

Filed Sept. 5th, 1868.

GEO. E. WHITNEY, *Clerk*,
By H. F. LARDNER, *D. C.*

67 *Answer of Wheeler Martin.*

United States circuit court, district of California.

GEORGE ALEXANDER *vs.* M. ROULET AND OTHERS. } Answer of Wheeler Martin, defendant.

I. Wheeler Martin, one of the defendants in the above-entitled action, for his first separate answer to the plaintiff's complaint herein, denies that, on the 10th day of April, 1868, or at any time, the plaintiff was, or is, either the owner or entitled to the possession of, or ever was in possession of, the piece or parcel of land described in the complaint, or of any part thereof; and denies that, on or about the said 12th day of April, or at any time, this defendant wrongfully or unlawfully entered upon or into possession of said lands or premises, or of any part thereof; and denies that he has ever at any time detained or witheld, or that he does withold or detain, the said lands, or any part thereof, from the said plaintiff; or that he is, or that he ever was at any time, in possession of any part of said premises, except the following-described parcels thereof, to wit:

68 All those three certain pieces or parcels of land situate in the city and county of San Francisco, State of California, bounded and described as follows, viz:

First. Commencing at a point in Mission Block, number 102, distant one hundred and fifteen feet at right angles northwesterly from Market street, at a point in the northwesterly line of Market street distant three hundred and ninety feet southwesterly from the corner formed by the intersection of the northwesterly line of Market street with the southerly line of Sparks street; thence from said point in Mission Block, number 102, southwesterly, on a line parallel with Market street, one hundred and twenty-five feet; thence at right angles southeasterly to the southerly line of the premises in said complaint described; thence easterly along said southerly line of the premises in said plaintiff's complaint described, to a point in said last-mentioned line, where it is intersected by a line drawn at right angles to Market street, at a point in the northwesterly line of Market street, distant three hundred and ninety feet southwesterly from the southwesterly corner of Market and Sparks streets; and thence northwesterly to the point of beginning, being portions of lots numbers 6, 7, 8, 9, and 10, in Mission Block,

69 number 102.

Second. Commencing at a point in the southerly line of Sparks street, distant one hundred and twenty-five feet easterly from the southeasterly corner of Sparks and Noe streets; thence easterly along said line of Sparks streets seventy-five feet; thence at right angles southerly one hundred and thirty-two feet seven inches; thence southwesterly, on a line parallel with Market street, fifty-two feet and one-half inch; thence at right northwesterly fifty-four feet five and one-half inches; and thence northerly, parallel with Noe street, one hundred and twenty-five feet, to the point of beginning, being lots numbered 27, 28, and 29, in Mission Block, number 102.

Third. Commencing at a point in the easterly line of Noe street, distant one hundred and twenty-five southerly from the southeasterly corner of Noe and Sparks streets; thence running southerly along the easterly line of Noe street one hundred feet; thence at right angles easterly ninety-one feet ten and three-quarter inches; thence north-

easterly, parallel with Market street, ninety feet and one-half inch; thence at right angles northwesterly fifty-four feet five and one-
70 half inches; and thence westerly, on a line parallel with Sparks street, one hundred and twenty-five feet, to the place of beginning, being lots numbers 35, 36, 37, and 38, in Mission Block, number 102.

And he admits that, on the 10th day of April, 1868, and long prior thereto, he was, and still is, in possession of said last-described parcels of the premises described in the complaint, and alleges that long prior to said 10th day of April, 1868, he was, and is, seized in fee, and the owner, and lawfully entitled to the possession of the same.

II. And for a second further separate answer to the plaintiff's complaint the defendant alleges that this defendant, and those under whom he claims and derives his possession and rights in and to the last-described lands, parcel as aforesaid, entered into possession of certain parcels of the said lands described in the said complaint, under a claim of title, exclusive of any other right, founding such claim upon a certain written instrument, as being a conveyance of the said last-described lands, parcels as aforesaid, and of other lands; the date and names of the grantor and grantees in said conveyance are as follows, namely:

Date, July 13th, A. D. 1853; grantor, James R. Bolton; grantee, George W. Wright.

71 And that the said adverse possession of the said last-described lands, parcels as aforesaid, under the said adverse claim of title, existed and continued without interruption for five years last before the commencement of this action—

1. By having and keeping the said parcels usually cultivated and improved;

2. By having and keeping the said parcels protected by a substantial enclosure;

3. By using the said parcels for the supply of fuel;

4. By using the said parcels for the supply of fencing timber, for the purpose of husbandry; and

5. By employing the said parcels for the ordinary use of the occupant—

which said last-mentioned pieces and parcels of lands is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for no other purpose.

That neither the plaintiff, his ancestors, predecessors, or grantors, has had the actual possession of the said parcel, or of any part thereof, at any time within five years next before the commencement of this action.

IV. And for a further fourth *fourth* separate answer this defendant avers that this action was not commenced within one year
72 after a certain act of the legislature of the State of California, approved March 4th, 1864, and entitled "An act to limit the time for the commencement of civil actions in certain cases," took effect; that this action is brought for the recovery of real property, and for the possession thereof, situated in the said city and county of San Francisco; and that said real property was, and is, above the natural high-water mark of the bay of San Francisco, as the same existed at the time of the admission of California into the Union as a State, and is situated within the corporate limits of the city of San Francisco, as defined in the act to incorporate said city, passed April 15th, 1851, and is not within any of the exceptions made by a certain act of the legislature of said State, approved March 11th, 1858, and entitled "An act concerning the city of San Francisco and to ratify and confirm certain

names of the grantor and grantees in said conveyance are as follows, namely:

Date, July 13th, A. D. 1853; grantor, James R. Bolton; grantee, George W. Wright.

And that the said adverse possession of the said last-described lands, parcel as aforesaid, under the said adverse claim of title, existed and continued without interruption for five years last before the commencement of this action—

1. By having and keeping the said parcels usually cultivated and improved;

2. By having and keeping the said parcels protected by a substantial enclosure;

3d. By using the said parcels for the supply of fuel;

4th. By using the said parcels for the supply of fencing timber for the purpose of husbandry; and

5. By employing the said parcel for the ordinary use of the occupant—

which said last-mentioned pieces and parcels of land are particularly described in the preceding first separate answer, reference being
84 had thereto for the purpose of said description, and for no other purpose.

That neither the plaintiff, his ancestors, predecessors, or grantors, has had the actual possession of the said parcels, or of any part thereof, at any time within five years next before the commencement of this action.

IV. And for a further fourth separate answer this defendant avers that this action was not commenced within one year after a certain act of the legislature of the State of California, approved March 4th, 1864, and entitled "An act to limit the time for the commencement of civil actions in certain cases," took effect; that this action is brought for the recovery of real property, and for the possession thereof, situated in the said city and county of San Francisco; and that said real property was, and is, above the natural high-water mark of the bay of San Francisco, as the same existed at the time of the admission of California into the Union as a State, and is situated within the corporate limits of the city of San Francisco, as defined in the act to incorporate said city, passed April 15th, 1851, and is not within any of the exceptions made by a certain act of the legislature of said State, approved March 11th, 1858, and entitled "An act concerning the city of San Francisco and to ratify and confirm
85 certain ordinances of the common council of said city," by which exception certain lands were excluded from the operation of said last-named act.

V. And for a further fifth separate answer to the plaintiff's complaint in this action this defendant alleges that he, and those under whom he claims, to have been in the actual, quiet, and peaceable occupancy and possession, exclusive of any other right, and adversely to the plaintiff, and to all other persons, for more than five years next before the commencement of this action—

1. By having and keeping the same protected by a substantial enclosure;

2. By having and keeping the same usually cultivated and improved—

of certain other parcels of the lands described in the complaint in this action, which said certain other parcels is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for no other purpose.

VI. And for a further sixth separate answer to said plaintiff's com-

plaint this defendant denies each and all the allegations of said complaint.

E. B. MASTICK,
Attorney of the Defendant named in the preceding answers.

86 JOHN W. DWINELLE, *of Counsel.*

(Endorsed:)

Service of a copy of the within answer admitted this 5th day of September, 1868.

PATTERSON, WALLACE AND STOW,
Attorneys for Plaintiff.

Filed Sept. 5th, 1868.

GEO. E. WHITNEY, *Clerk*,
By H. F. LARDNER, *D. C.*

87 *Answer of R. K. Rogers.*

United States circuit court, district of California.

GEORGE ALEXANDER *vs.* M. ROULET AND OTHERS. } Answer of R. K. Rogers, defendant.

I. R. K. Rogers, one of the defendants in the above-entitled action, for his first separate answer to the plaintiff's complaint herein, denies that, on the 10th day of April, 1868, or at any time, the plaintiff was, or is, either the owner or entitled to the possession of, or ever was in possession of, the piece or parcel of land described in the complaint, or of any part thereof; and denies that, on or about the said 12th day of April, or at any time, this defendant wrongfully or unlawfully entered upon or into possession of said lands or premises, or of any part thereof; and denies that he has ever at any time detained or witheld, or that he does withhold or detain, the said lands or any part thereof, from the said plaintiff; or that he is, or that he ever was at any time, in possession of any part of said premises, except the following-described parcel thereof, to wit:

All that certain lot or parcel of land situate in the city and county of San Francisco, State of California, bounded and described as fol-
88 lows, viz: Commencing at a point in the northerly line of Sparks street, distant three hundred and twenty (320) feet westerly from the northwesterly corner of Sparks and Noe streets; thence westerly along the northerly line of Sparks street, forty (40) feet; thence at right angles northerly one hundred and fifteen (115) feet; thence at right angles easterly forty (40) feet; thence at right angles southerly one hundred and fifteen (115) feet, to the point of beginning, being part of Mission Block, No. 118.

And he admits that, on the 10th day of April, 1868, and long prior thereto, he was, and still is, in possession of said last-described parcel of the premises described in the complaint, and alleges that long prior to said 10th day of April, 1868, he was, and is, seized in fee, and the owner, and lawfully entitled to the possession of the same.

II. And for a second further separate answer to said plaintiff's complaint this defendant denies each and all of the allegations thereof, except such as are hereinafter specially admitted. He admits that, prior to and on said 10th day of April, A. D. 1868, he was, and ever since has

been, and is, in the possession of a certain piece and parcel of the premises, which said piece and parcel is particularly described in the preceding first separate answer, reference being had thereto
89 for the purpose of said description, and for that purpose solely.

And he alleges that, on and long prior to the said 10th day of April, 1868, he was, and has ever since been, and is, seized in fee, and the owner, and entitled to the possession of said last above-described piece and parcel of said premises.

III. And for a third further separate answer to the plaintiff's complaint this defendant alleges that this defendant, and those under whom he claims and derives his possession and rights in and to the last-described lands, parcel as aforesaid, entered into possession of a certain parcel of the said lands described in the said complaint, under a claim of title, exclusive of any other right, founding such claim upon a certain written instrument, as being a conveyance of the said last-described lands, parcel as aforesaid, and of other lands; the date and names of the grantor and grantees in said conveyance are as follows, namely:

Date, July 13th, A. D. 1853; grantor, James R. Bolton; grantee, George W. Wright.

And that the said adverse possession of the said last-described lands, parcel as aforesaid, under the said adverse claim of title, existed and continued without interruption for five years last before the commencement of this action—

90 1. By having and keeping the said parcel usually cultivated and improved;

2. By having and keeping the said parcel protected by a substantial enclosure;

3. By using the said parcel for the supply of fuel;

4. By using the said parcel for the supply of fencing timbers for the purpose of husbandry; and

5. By employing the said parcel for the ordinary use of the occupant—

which said last-mentioned piece and parcel of lands is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for no other purpose.

That neither the plaintiff, his ancestors, predecessors, or grantors, has had the actual possession of the said parcel, or of any part thereof, at any time within five years next before the commencement of this action.

IV. And for a further fourth separate answer this defendant avers that this action was not commenced within one year after a certain act of the legislature of the State of California, approved March 4th, 1864, and entitled "An act to limit the time for the commencement of civil actions in certain cases," took effect; that this action is brought
91 for the recovery of real property, and for the possession thereof, situated in the said city and county of San Francisco; and that said real property was, and is, above the natural high-water mark of the bay of San Francisco, as the same existed at the time of the admission of California into the Union as a State; and is situated within the corporate limits of the city of San Francisco, as defined in the act to incorporate said city, passed April 15th, 1851, and is not within any of the exceptions made by a certain act of the legislature of said State, approved March 11th, 1858, and entitled "An act concerning the city of San Francisco and to ratify and confirm certain ordinances of the common council of said city," by which exception certain lands were excluded from the operation of said last-named act.

V. And for a further fifth separate answer to the plaintiff's complaint in this action this defendant alleges that he, and those under whom he claims, have been in the actual, quiet, and peaceable occupancy and possession, exclusive of any other right, and adversely to the plaintiff, and to all other persons, for more than five years next before the commencement of this action—

1. By having and keeping the same protected by a substantial enclosure; and

92 2. By having and keeping the same usually cultivated and improved—

of a certain other parcel of the lands described in the complaint in this action, which said certain other parcel is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for no other purpose.

VI. And for a further sixth separate answer to said plaintiff's complaint this defendant denies each and all the allegations of said complaint.

E. B. MASTICK,
Attorney for the Defendant named in the preceding answers.
JOHN W. DWINELLE, *of Counsel.*

(Endorsed:)
Service of a copy of the within answer admitted this 5th day of September, 1868.
PATTERSON, WALLACE AND STOW,
Attorneys for Plaintiff.

Filed Sept. 5th, 1868.
GEO. E. WHITNEY, *Clerk*,
By H. F. LARDNER, *D. C.*

93 *Answer of The Hillside Homestead Association.*

United States circuit court, district of California.

GEORGE ALEXANDER *vs.* M. ROULET AND OTHERS. } Answer of The Hillside Homestead Association, defendant.

The Hillside Homestead Association, a corporation duly formed and incorporated under the laws of the State of California, and having its principal place of business in San Francisco, one of the defendants in the above-entitled action, for its first separate answer to the plaintiff's complaint herein, denies that, on the 10th day of April, 1868, or at any time, the plaintiff was, or is, either the owner or entitled to the possession of, or ever was in possession of, the piece or parcel of land described in the complaint, or of any part thereof; and denies that, on or about the said 12th day of April, or at any time, this defendant wrongfully or unlawfully entered upon or into possession of said lands or premises, or of any part thereof; and denies that it has ever at any time detained or witheld, or that it does withold or detain, the said lands, or any part thereof, from the said plaintiff; or that it is, or that it ever was at any time in possession of any part of said premises, except the following described parcel thereof, to wit:

94 All those three certain lots or parcels of land situate in the city and county of San Francisco, State of California, bounded and described as follows, viz:

First. Commencing at a point in the southerly line of Sparks or 15th street, distant one hundred and ten (110) feet westerly from the southwest corner of Sparks and Noe streets; thence at right angles southerly parallel with Noe street two hundred and thirty (230) feet to the northerly line of Beaver street; thence at right angles westerly along the northerly line of Beaver street two hundred and thirty feet, more or less, to the westerly line of the lands in said complaint described; thence northerly along said westerly line of lands in the complaint described, to a point in the southerly line of Sparks street, distant 360 feet, more or less, westerly from the southwesterly corner of Sparks and Noe streets; and thence easterly along said line of Sparks street two hundred and fifty (250) feet, more or less, to the point of commencement.

Second. Commencing at the northwesterly corner of Sparks or 15th street and Noe street, and running thence northerly along the west line of Noe street two hundred and thirty (230) feet; thence at right angles westerly along the south line of a street called "Henry" street three hundred and twenty (320) feet; thence at right angles southerly two hundred and thirty (230) feet to the north line of Sparks or
95 15th street; thence at right angles easterly along said line of Sparks or 15th street three hundred and twenty (320) feet, to the point of commencement.

Third. Commencing at the southwest corner of Noe and Tracy or 14th streets and running thence southerly along the west line of Noe street two hundred and thirty (230) feet; thence at right angles westerly along the northerly line of a street called "Henry" street to the westerly line of the land in plaintiff's complaint described; thence northerly along said westerly line of land in said complaint described to the southerly line of Tracy street, and thence easterly along the southerly line of Tracy street to the point of commencement.

Said lots or parcels of land being portions of Mission Blocks, Nos. 117 and 118, according to the official map of the city of San Francisco.

And this defendant admits that, on the 10th day of April, 1868, and long prior thereto, it was, and still is, in possession of said last-described parcels of the premises described in the complaint, and alleges that long prior to said 10th day of April, 1868, it was, and is, seized in fee, and the owner, and lawfully entitled to the possession of the same.

II. And for a second further separate answer to said plaintiff's complaint this defendant denies each and all the allegations thereof,
96 except such as hereinafter specially admitted. It admits that, prior to and on said 10th day of April, A. D. 1868, it was, and ever since has been, and is, in the possession of three pieces and parcels of the premises, which said pieces and parcels are particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for that purpose solely. And it alleges that, on and long prior to the said 10th day of April, 1868, it was, and has ever since been, and is, seized in fee, and the owner, and entitled to the possession of said last above-described pieces and parcels of said premises.

III. And for a third further separate answer to the plaintiff's complaint this defendant alleges that this defendant, and those under whom it claims and derives its possession and rights in and to the last-described lands, parcels as aforesaid, entered into possession of certain

parcels of the said lands described in the said complaint, under a claim of title, exclusive of any other right, founding such claim upon a certain written instrument, as being a conveyance of the said last-described lands, parcels as aforesaid, and of other lands; the date and names of the grantor and grantees in said conveyance are as follows, namely:

Date, July 13th, A. D. 1853; grantor, James R. Bolton; grantee, George W. Wright.

97 And that the said adverse possession of the said last-described parcels as aforesaid, under the said adverse claim of title, existed and continued without interruption for five years last before the commencement of this action—

1. By having and keeping the said parcels usually cultivated and improved;

2. By having and keeping the said parcels protected by a substantial enclosure;

3. By using the said parcels for the supply of fuel;

4. By using the said parcels for the supply of fencing timber for the purpose of husbandry; and

5. By employing the said parcels for the ordinary use of the occupant—

which said last-mentioned pieces and parcels of land are particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for no other purpose.

That neither the plaintiff, his ancestors, predecessors, or grantors has had the actual possession of the said parcels, or of any part thereof, at any time within five years next before the commencement of this action.

IV. And for a further fourth separate answer this defendant avers that this action was not commenced within one year after a certain act of the legislature of the State of California, approved March

98 4th, 1864, and entitled "An act to limit the time for the commencement of civil actions in certain cases," took effect; that this action is brought for the recovery of real property, and for the possession thereof, situated in the said city and county of San Francisco; and that said real property was, and is, above the natural high-water mark of the bay of San Francisco, as the same existed at the time of the admission of California into the Union as a State, and is situated within the corporate limits of the city of San Francisco, as defined in the act to incorporate said city, passed April 15th, 1851, and is not within any of the exceptions made by a certain act of the legislature of said State, approved March 11th, 1858, and entitled "An act concerning the city of San Francisco and to ratify and confirm certain ordinances of the common council of said city," by which exception certain lands were excluded from the operation of said last-named act.

V. And for a further fifth separate answer to the plaintiff's complaint in this action this defendant alleges that it, and those under whom it claims, have been in the actual, quiet, and peaceable occupancy and possession, exclusive of any other right, and adversely to the plaintiff, and to all other persons, for more than five years next before the commencement of this action—

99 1. By having and keeping the same protected by a substantial enclosure; and

2. By having and keeping the same usually cultivated and improved—

of certain other parcels of the lands described in the complaint in this action, which said certain other parcels are particularly described in the

preceding first separate answer, reference being had thereto for the purpose of said description, and for no other purpose.

VI. And for a further sixth separate answer to said plaintiff's complaint this defendant denies each and all the allegations of said complaint.

E. B. MASTICK,
Attorney for the Defendant named in the preceding answers.
JOHN W. DWINELLE, *of Counsel.*

(Endorsed:)

Service of a copy of the within answer admitted this 5th day of September, 1868.

PATTERSON, WALLACE & STOW,
Attorneys for Plaintiff.

Filed Sept. 5, 1868.

GEO. E. WHITNEY, *Clerk*,
By H. F. LARDNER, *D. C.*

100 *Answer of Anna J. Lindenberger.*

United States circuit court, district of California.

GEORGE ALEXANDER *vs.* M. ROULET AND OTHERS. } Answer of Anna J. Lindenberger, defendant.

1. Anna J. Lindenberger, one of the defendants in the above-entitled action, for her first separate answer to the plaintiff's complaint herein, denies that, on the 10th day of April, 1868, or at any time, the plaintiff, was, or is, either the owner or entitled to the possession of, or ever was in possession of, the piece or parcel of land described in the complaint, or of any part thereof; and denies that, on or about the said 12th day of April, or at any time, this defendant wrongfully or unlawfully entered upon or into possession of said lands or premises, or of any part thereof; and denies that she has ever at any time detained or witheld, or that she does withold or detain, the said lands, or any part thereof, from the said plaintiff; or that she is, or that she ever was at any time, in possession of any part of said premises, except the following-described parcel thereof, to wit:

101 All that certain lot or parcel of land situate in the city and county of San Francisco, State of California, bounded and described as follows, viz: Commencing at a point in the northwesterly line of Market street, distant one hundred and ninety (190) feet southwesterly from the corner formed by the intersection of the northwesterly line of Market street with the southerly line of Sparks street; thence running southwesterly said line of Market street seventy-five (75) feet; thence at right angles northwesterly one hundred and fifteen (115) feet; thence at right angles northeasterly seventy-five (75) feet, and thence at right angles southeasterly one hundred and fifteen (115) feet to the point of commencement, being a portion of Mission Block, No. 162. And she admits that, on the 10th day of April, 1868, and long prior thereto, *he* was, and still is, in possession of said last-described parcel of the premises described in the complaint, and alleges that long prior to said 10th day of April, 1868, she was, and is, seized in fee, and the owner, and lawfully entitled to the possession of the same.

II. And for a second further separate answer to said plaintiff's complaint this defendant denies each and all the allegations thereof, except such as are hereinafter specially admitted. She admits that, prior to and on said 10th day of April, A. D. 1868, she was, and ever
102 since has been, and is, in possession of a certain piece and parcel of the premises, which said piece and parcel is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for that purpose solely. And she alleges that, on and long prior to the said 10th day of April, 1868, she was, and has ever since been, and is, seized in fee, and the owner, and entitled to the possession of said last above-described piece and parcel of said premises.

III. And for a third further separate answer to the plaintiff's complaint this defendant alleges that this defendant, and those under whom she claims and derives her possession and rights in and to the last-described lands, parcel as aforesaid, entered into possession of a certain parcel of the said lands described in the said complaint, under a claim of title, exclusive of any other right, founding such claim upon a certain written instrument, as being a conveyance of the said last-described lands, parcel as aforesaid, and of other lands; the date and names of the grantor and grantees in said conveyance are as follows namely:

Date, July 13th, A. D. 1853; grantor, James R. Bolton; grantee, George W. Wright.

103 And that the said adverse possession of the said last-described lands, parcel as aforesaid, under the said adverse claim of title, existed and continued without interruption for five years last before the commencement of this action—

1. By having and keeping the said parcel usually cultivated and improved;

2. By having and keeping the said parcel protected by a substantial enclosure;

3. By using the said parcel for the supply of fuel;

4. By using the said parcel for the supply of fencing timber for the purpose of husbandry; and

5. By employing the said parcel for the ordinary use of the occupant—which said last-mentioned piece and parcel of lands is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for no other purpose.

That neither the plaintiff, his ancestors, predecessors, or grantors has had the actual possession of the said parcel, or of any part thereof, at any time within five years next before the commencement of this action.

IV. And for a further fourth separate answer this defendant avers that this action was not commenced within one year after a certain act of the legislature of the State of California, approved March 4th,
104 1864, and entitled "An act to limit the time for the commencement of civil actions in certain cases" took effect; that this action is brought for the recovery of real property, and for the possession thereof, situated in the said city and county of San Francisco; and that said real property was, and is, above the natural high-water mark of the bay of San Francisco, as the same existed at the time of the admission of California into the Union as a State, and is situated within the corporate limits of the city of San Francisco, as defined in the act to incorporate said city, passed April 15th, 1851, and is not within any of the exceptions made by a certain act of the legislature of said State, approved March 11th, 1858, and entitled an "Act concerning the city of San Francisco and to ratify, and confirm certain ordinances of the

common council of said city," by which exception certain lands were excluded from the operation of said last-named act.

V. And for a further fifth separate answer to the plaintiff's complaint this defendant alleges that she, and those under whom she claims, have been in the actual, quiet, and peaceable occupancy and possession, exclusive of any other right, and adversely to the plaintiff and to all other persons, for more than five years next before the commencement of this action—

105 1. By having and keeping the same protected by a substantial enclosure; and

2. By having and keeping the same usually cultivated and improved—of a certain other parcel of the lands described in the complaint in this action, which said certain other parcel is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for no other purpose.

VI. And for a further sixth separate answer to said plaintiff's complaint this defendant denies each and all the allegations of said complaint.

E. B. MASTICK,
Attorney for the Defendant named in the preceding answers.
JOHN W. DWINELLE, *of Counsel.*

(Endorsed:)
Service of a copy of the within answer admitted this 5th day of September, 1868.

PATTERSON, WALLACE AND STOW,
Attorneys for Plaintiff.

Filed Sept. 5th, 1868.

GEO. E. WHITNEY, *Clerk*,
By H. F. LARDNER, *D. C.*

106 *Answer of def'ts Davis and Sharp.*

In the circuit court of the United States in and for the district of California.

GEORGE ALEXANDER
vs.
ISAAC E. DAVIS AND GEO. F. SHARP, impleaded with M. Roulett, et al.

First. And now come the defendants, Isaac E. Davis and George F. Sharp, and for answer to plaintiff's complaint herein they deny each and every, all and singular, the allegations in said complaint contained.

And for a further answer herein they deny that, on the tenth day of April, A. D. 1868, or at any other time, the plaintiff was, or is now, or ever has been, the owner, or entitled to the possession of the land and premises described in the complaint, or of any part or parcel thereof.

They deny that, on the 12th day of April, 1868, or at any other time, they wrongfully or unlawfully entered into or upon the possession of said land and premises, or any part or parcel thereof, or that they now detain, or ever have detained or *withed*, from plaintiff
107 the possession of said land and premises, or of any part or parcel thereof.

They deny that plaintiff has been to any sum or amount whatever damaged in the premises.

Third. And for a further answer and defense herein these defendants aver that they were, at the time of the commencement of this action, and for more than ten years prior thereto, the owners in fee simple, and still are such owners, and lawfully entitled to the possession of the land and premises described as follows, to wit:

All that certain lot, piece, or parcel of land situate in the city and county of San Francisco, parcel of the land and premises described in the complaint herein, and particularly bounded and described as follows, to wit: Commencing at a stake on the northeast corner of Francisco Guerro's four-hundred vara lot; running thence westwardly eight hundred and seventy-two (872) yards, or thereabouts, to the line of the second survey of the city boundary; thence running at right angles northerly on said city boundary line two hundred and twenty-four (224) yards, or thereabouts, to the southern line of land owned by Jones and De Witty; thence at right angles easterly eight hundred and
108 seventy-two (872) yards, or thereabouts, to a stake on the east side of the Presidio road; and from thence at right angles southerly two hundred and twenty-four (244) yards, or thereabouts, to the point of beginning, containing forty acres, more or less, being in the tract of land known as the "Birdsnest," at the "Mission Dolores," and on the "Presidio Road."

And for a further and separate answer and defense herein these defendants say that this action was not commenced within one year after the act of the legislature of the State of California, approved March 4th, 1864, and entitled "An act to limit the time for the commencement of civil actions in certain cases" took effect; that this action is brought for the recovery of real property, and for the possession thereof, situate in the city and county of San Francisco; and that said real property is above the natural high-water mark of the bay of San Francisco, at the time of the admission of California into the Union as a State, and is situate within the corporate limits of the city and county of San Francisco as defined in the act to incorporate said city, and is not within any of the exceptions made by the act of the legislature of said State, approved March 11th, 1858, and entitled "An act concerning the city of San Francisco and to ratify and confirm certain ordinances of
109 the common council of said city," by which exceptions certain lands were excluded from the operation of said last-named act.

And for a further and separate answer and defense herein these defendants state that the plaintiff ought not to have or maintain his action herein, because they say that neither said plaintiffs nor his ancestors, predecessors, or grantors were seized or possessed of the land and premises hereinbefore described, or of any part or parcel thereof, within five years next preceding the commencement of this action.

And defendants further say that they, the said defendants, have been in the open, notorious, and adverse possession of the land and premises hereinbefore described, under claim of title, and not otherwise, for five years and upwards next preceding the commencement of this action.

Wherefore defendants pray to be hence dismissed, with their costs.

San Francisco, September 14, 1868.

G. F. & W. H. SHARP,
Att'ys for Def'ts, G. F. Sharp and I. E. Davis.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

George F. Sharp, being duly sworn, says that he is one of
110 the defendants in the above-entitled action; that he has read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, except those matters therein stated on his information and belief, and as to those matters he believes it to be true.

GEO. F. SHARP.

Subscribed and sworn to before me this 14th day of Sept'r, A. D. 1868.

H. F. LARDNER,
U. S. Com'r.

Service of a copy of within answer admitted this 14th day of September, 1868.

PATTERSON, WALLACE & STOW,
Att'ys for Pl'ff.

(Endorsed:) Filed Sept. 14, 1868. Geo. E. Whitney, clerk, by H. F. Lardner, D. C.

111 *Answer of Timothy Ellsworth.*

United States of America, district of California.

GEORGE ALEXANDER
v.
M. ROULET AND OTHERS. } Answer of defendant.

I. Timothy Ellsworth, one of the defendants in the above-entitled action, for his first separate answer to the plaintiff's complaint herein, denies that, on the 10th day of April, 1868, or at any time, the plaintiff was, or is, either the owner or entitled to the possession of, or ever was in possession of, the piece or parcel of land described in the complaint, or of any part thereof; and denies that, on or about the said 12th day of April, or at any time, this defendant wrongfully or unlawfully entered upon or into possession of said lands or premises, or of any part thereof; and denies that he has ever at any time detained or witheld, or that he does withhold or detain, the said lands, or any part thereof, from the said plaintiff; or that he is, or that he ever was at any time, in possession of any part of said premises, except the following-described parcel thereof, to wit:

112 All that certain piece or parcel of land situate in the city and county of San Francisco, State of California, bounded and described as follows, to wit: Commencing at a point in the southeasterly line of Market street, distant one hundred and nine (109) feet southwesterly from the corner formed by the intersection of the southeasterly line of Market street with the westerly line of Sanchez street; thence southwesterly along the southeasterly line of Market street to the southerly line of the lands in said complaint described; thence easterly along the southerly line of the lands in said complaint described to a point in said last mentioned line where it is intersected by a line running southeasterly from, and at right angles to, Market street, and intersecting Market street at the point of commencement, and running thence northwesterly to the point of beginning.

And he admits that, on the 10th day of April, 1868, and long prior thereto, he was, and still is, in possession of said last-described parcel of the premises described in the complaint, and alleges that long prior to said 10th day of April, 1868, he was, and is, seized in fee, and the owner, and lawfully entitled to the possession of the same.

113 II. And for a second further separate answer to said plaintiff's complaint this defendant denies each and all of the allegations thereof, except such as are hereinafter specially admitted. He admits that, prior to and on said 10th day of April, A. D. 1868, he was, and ever since has been, and is, in the possession of a certain piece and parcel of the premises, which said piece and parcel is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for that purpose solely.

And he alleges that on, and long prior to, the said 10th day of April, 1868, he was, and has ever since been, and is, seized in fee, and the owner, and entitled to the possession of said last above-described piece and parcel of said premises.

III. And for a third further separate answer to the plaintiff's complaint this defendant alleges that this defendant, and those under whom he claims and derives his possession and rights in and to the last-described lands, parcel as aforesaid, entered into possession of a certain parcel of the said lands described in the said complaint, under a claim of title, exclusive of any other right, founding

114 such claim upon a certain written instrument, as being a conveyance of the said last-described lands, parcel as aforesaid, and other lands; the date and names of the grantor and grantees in said conveyance are as follows, namely:

Date, July 13th, 1853; grantor, James R. Bolton; grantee, George W. Wright.

And that the said adverse possession of the said last-described lands, parcel as aforesaid, under the said adverse claim of title, existed and continued without interuption for five years before the commencement of this action—

1. By having and keeping the said parcel usually cultivated and improved;

2. By having and keeping the said parcel protected by a substantial enclosure;

3. By using the said parcel for the supply of fuel;

4. By using the said parcel for the supply of fencing timber for the purpose of husbandry; and

5. By employing the said parcel for the ordinary use of the occupant—

which said last-mentioned piece and parcel of lands is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for no other purpose.

That neither the plaintiff, his ancestors, predecessors, or gran-

115 tors has had the actual possession of the said parcel, or of any part thereof, at any time within five years next before the commencement of this action.

IV. And for a further fourth separate answer this defendant avers that this action was not commenced within one year after a certain act of the legislature of the State of California, approved March 4th, 1864, and entitled "An act to limit the time for the commencement of civil actions in certain cases," took effect; that this action is brought for the recovery of real property, and for the possession thereof, situated in the said city and county of San Francisco; and that said real prop-

erty was, and is, above the natural high-water mark of the bay of San Francisco, as the same existed at the time of the admission of California into the Union as a State, and is situated within the corporate limits of the city of San Francisco, as defined in the act to incorporate said city, passed April 15th, 1851, and is not within any of the exceptions made by a certain of the legislature of said State, approved March 11th, 1858, and entitled an "Act concerning the city of San Francisco and to ratify and confirm certain ordinances of the common council of said city," by which exception certain lands were excluded from the
116 operation of said last-named act.

V. And for a further fifth separate answer to the plaintiff's complaint in this action this defendant alleges that he, and those under whom he claims, have been in the actual, quiet, and peaceable occupancy and possession, exclusive of any other right, and adversely to the plaintiff, and to all other persons, for more than five years next before the commencement of this action—

1. By having and keeping the same protected by a substantial enclosure; and

2. By having and keeping the same usually cultivated and improved—of a certain other parcel of the lands described in the complaint in this action, which said certain other parcel is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for no other purpose.

VI. And for a further sixth separate answer to said plaintiff's complaint this defendant denies each and all the allegations of said complaint.

E. B. MASTICK,
Attorney for the Defendant named in the preceding answers.
JOHN W. DWINELLE, *of Counsel.*

117 (Endorsed:)

Service of a copy of the within answer admitted this 9th day of January, 1869.

PATTERSON, WALLACE AND STOW,
Attorneys for Plaintiff.

Filed Jan'y 11th, 1869.

GEO. E. WHITNEY, *Clk*,
P'r H. F. LARDNER, *D. C.*

118 *Answer of William J. Mayer.*

United States circuit court, district of California.

GEORGE ALEXANDER *vs.* M. ROULET AND OTHERS. } Answer of William J. Mayer, defendant.

I. William J. Mayer, one of the defendants in the above-entitled action, for his first separate answer to the plaintiff's complaint herein, denies that, on the 10th day of April, 1868, or at any time, the plaintiff was, or is, either the owner or entitled to the possession of, or ever was in possession of, the piece or parcel of land described in the complaint, or of any part thereof; and denies that, on or about the said 12th day of April, or at any time, this defendant wrongfully or unlawfully entered upon or into possession of said lands or premises, or of any part thereof;

and denies that he has ever at any time detained or withheld, or that he does withhold or detain, the said lands or any part thereof, from the said plaintiff; or that he is, or that he ever was at any time, in possession of any part of said premises, except the following-described
119 parcel thereof, to wit:

All that certain piece or parcel of land situate, lying, and being in the city and county of San Francisco, State of California, bounded and described as follows, to wit: Commencing at a point in the westerly line of Noe street distant fifty-five (55) feet southerly from the southwest corner of Noe and Sparks streets; thence running southerly along the westerly line of Noe street, seventy-five (75) feet; thence at right angles westerly and parallel with Sparks street one hundred and ten (110) feet; thence at right angles northerly seventy-five (75) feet; and thence at right angles easterly one hundred and ten (110) feet, to the point of beginning, being a portion of Mission Block, number 117.

And he admits that, on the 10th day of April, 1868, and long prior thereto, he was, and still is, in possession of said last-described parcel of the premises described in the complaint, and alleges that long prior to said 10th day of April, 1868, he was, and is, seized in fee, and the owner, and lawfully entitled to the possession of the same.

II. And for a second further separate answer to said plaintiff's complaint the defendant denies each and all the allegations thereof, except such as are hereinafter specially admitted. He admits that, prior
120 to and on said 10th day of April, 1868, he was, and ever since has been, and is, in the possession of a certain piece and parcel of the premises, which said piece and parcel is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for that purpose solely. And he alleges that, on and long prior to the said 10th day of April, 1808, he was, and has ever since been, and is, seized in fee, and the owner, and entitled to the possession of said last above-described piece and parcel of said premises.

III. And for a third further separate answer to the plaintiff's complaint this defendant alleges that this defendant, and those under whom he claims and derives his possession and rights in and to the last-described lands, parcel as aforesaid, entered into possession of a certain parcel of the said lands described in the said complaint, under a claim of title, exclusive of any other right, founding such claim upon a certain written instrument, as being a conveyance of the said last-described lands, parcel as aforesaid, and of other lands; the date and names of the grantor and grantees in said conveyance are as follows, namely:

Date, July 13th, 1853; grantor, James R. Bolton; grantee, George W. Wright.

121 And that the said adverse possession of the said last-described lands, parcel as aforesaid, under the said adverse claim of title, existed and continued without interruption for five years last before the commencement of this action—

1. By having and keeping the said parcel usually cultivated and improved;

2. By having and keeping the said parcel protected by a substantial enclosure;

3. By using the said parcel for the supply of fuel;

4. By using the said parcel for the supply of fencing timber for the purpose of husbandry; and

5. By employing the said parcel for the ordinary use of the occupant—which said last-mentioned piece and parcel of lands is particularly

2. By having and keeping the said parcel protected by a substantial enclosure;

3. By using the said parcel for the supply of fuel;

4. By using the said parcel for the supply of fencing timber for the purpose of husbandry; and

5. By employing the said parcel for the ordinary use of the occupant—

which said last-mentioned piece and parcel of lands is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for no other purpose.

That neither the plaintiff, his ancestors, predecessors, or grantors, has had the actual possession of the said parcel, or of any part thereof, at any time within five years next before the commencement of this action.

IV. And for a further fourth separate answer this defendant avers that this action was not commenced within one year after a certain act of the legislature of the State of California, approved March 4th, 1864, and entitled "An act to limit the time for the commencement of
128 civil actions in certain cases" took effect; that this action is brought for the recovery of real property, and for the possession thereof, situated in the said city and county of San Francisco; and that said real property was, and is, above the natural high-water mark of the bay of San Francisco, as the same existed at the time of the admission of California into the Union as a State, and is situated within the corporate limits of the city of San Francisco, as defined in the act to incorporate said city, passed April 15th, 1851, and is not within any of the exceptions made by a certain act of the legislature of said State, approved March 11th, 1858, and entitled "An act concerning the city of San Francisco and to ratify and confirm certain ordinances of the common council of said city," by which exception certain lands were excluded from the operation of said last-named act.

V. And for a further fifth separate answer to the plaintiff's complaint in this action this defendant alleges that he, and those under whom he claims, have been in the actual, quiet, and peaceable occupancy and possession, exclusive of any other right, and adversely to the plaintiff and to all other persons, for more than five years next before the commencement of this action—

1. By having and keeping the same protected by a substantial enclosure; and

129 2. By having and keeping the same usually cultivated and improved—

of a certain other parcel of the lands described in the complaint in this action, which said certain other parcel is particularly described in the preceding first separate answer, reference being had thereto for the purpose of said description, and for no other purpose.

VI. And for a further sixth separate answer to said plaintiff's complaint this defendant denies each and all the allegations of said complaint.

E. B. MASTICK,
Attorney for the Defendant named in the preceding answers.

JOHN W. DWINELLE, *of Counsel.*

(Endorsed:)

Due service of a copy of the within answer admitted this 29th Nov. 1869.

W. H. PATTERSON,
Att'y for Pl'ff.

Filed Nov. 30, 1869.

GEO. E. WHITNEY, *Clk*,
By H. F. LARDNER, *D. C.*

130 *Findings.*

U. S. circuit court, district of California, October term, 1869.

GEORGE ALEXANDER *vs.* M. ROULET ET AL. } Action to recover possession of real property.

In pursuance of the stipulation of the parties, this cause having been tried by the court without the intervention of a jury, the court now finds and states the following conclusions of fact herein:

I. That from and after August, 1849, to and inclusive of January 12, 1850, by virtue of an appointment from the then military governor of the then Territory of California, and an election by the people of the district, Horace Hawes was acting as prefect of the district embracing the then pueblo, now city, of San Francisco, and that while acting as such prefect, to wit, upon January 12, 1850, and upon due petition and proceedings therefor, said Prefect Hawes granted to Edward Carpenter, then a resident of the former Mission Dolores, in the pueblo aforesaid, the premises in controversy, and in the complaint herein mentioned and described, to wit, a four-hundred vara lot, situate at or near the
131 mission aforesaid, in the pueblo aforesaid, by definite and certain metes and bounds, the said lot being then a part of the common lands of said pueblo; and that the plaintiff herein, on and before April 12, 1868, by virtue of sundry mesne conveyances had acquired and become the owner of all the interest in and title to said premises theretofore granted to said Carpenter as aforesaid.

II. That the premises in controversy are within the limits of the lands of the once pueblo, now city, of San Francisco, and that in the month of July, 1852, said city presented a claim for said pueblo lands, to wit, for four square leagues, to the board of land commissioners, organized under the act of Congress of March 3d, 1851, entitled "An act to ascertain and settle private land claims in the State of California." And that afterwards, to wit, on December 21, 1854, said board confirmed said claim to said city, in part, which confirmation included the premises in controversy; and that thereafter an appeal was duly taken from said decree of confirmation to the proper U. S. district court for the district of California; and that thereafter, and while said claim was pending in said district court, to wit, on September 4, 1864, said proceeding, under and by virtue of an act of Congress of July 1, 1864, in that behalf,
132 was transferred to the U. S. circuit court for the district of California. And that thereafter, to wit, May 18, 1865, said circuit court fully confirmed the claim of said city, and that thereafter an appeal was taken from said decree of confirmation to the U. S. Supreme Court. And that thereafter, to wit, on February 4, 1867, the mandate of said Supreme Court, in all respects confirming the decree of said circuit court, was filed and entered in said circuit court, and that no patent has issued for said claim upon said decree of confirmation.

III. That the premises in controversy are within the limits and are a part of the lands mentioned and described in an ordinance of the city of San Francisco, of June 20, 1855, commonly known as the Van Ness ordinance, and that said ordinance was confirmed by an act of the legis-

lative assembly of the State of California, of March 11, 1858, and that the defendants herein, on and before January 1, 1855, were by themselves, or their tenants, in the actual possession of the several portions of the premises aforesaid, mentioned and described in their several answers herein, and that said defendants have all the interest in and title to the premises so possessed by them, conferred upon such actual possessors by the ordinance aforesaid, confirmed as aforesaid; and
133 also by the provisions of an act of Congres of July 1, 1864, entitled "An act to expedite the settlement of titles to lands in the State of California." And that said defendants from January 1, 1855, to the commencement of this action, by themselves, or their tenants, continued in the actual possession of the several portions of the premises aforesaid, mentioned and described in their several answers herein, and that such possession was open and notorious, and adverse to all the world.

IV. That the premises in controversy are of the value of $10,000.

And as conclusions of law from the foregoing the court finds and states as follows:

I. That each prefect of California, while the same was a part of the Mexican territory, was authorized and had the power, by virtue of article 77 of the decree of March 20, 1837, to make grants of the common or unappropriated lands of the pueblos within their jurisdiction, but that from and after the conquest and acquisition of the country by the United States the prefect ceased to have such power or authority, and that therefore the grant by Horace Hawes of the premises in controversy to Edward Carpenter as aforesaid was without authority of law and void, and of no effect.

134 II. That under the Mexican laws, in force in California, the prefect was not a municipal officer or officer of the pueblo, and that the grantees of land granted by a prefect within the limits of a pueblo did not derive title from or hold under the pueblo, but from and under the general government, of which the prefect was a subordinate officer and representative, and that, therefore, the confirmation by the United States under the act of Congress of March 3d, 1851, of the lands of the pueblo of San Francisco, did not enure to the benefit of persons who held or claimed land therein under grants made by prefects.

III. That a person claiming a grant of land made by a prefect within the pueblo of San Francisco, subsequent to the conquest and acquisition of the country by the United States, cannot derive title to the same from the Spanish or Mexican government, and is not, therefore, within the purview and operation of the treaty of Guadalupe Hidalgo or the act of Congress of March 3, 1851, to ascertain and settle private land claims in California.

IV. That under the act of April 11, 1855, limiting the time for the commencement of actions for the recovery of real property, the plaintiff, and those under whom he claims, on and after the expiration of
135 five years from the date of said act, were, and still are, barred from maintaining any action to recover from the defendants, or either of them, the possession of the several portions of the premises in controversy, and mentioned and described in their several answers, and of which such defendants were in the actual possession as aforesaid.

V. That at the commencement of this action the plaintiff as against the defendants herein, or either of them, was not entitled to the possession of the several portions of the premises in controversy, and mentioned and described in the several answers of the said defendants, and

that said defendants, or either of them, did not then wrongfully detain the possession of said premises from the plaintiff, or any part thereof.

(Signed) DEADY, *J.*

(Endorsed:) "Filed 11th December, 1869. Geo. E. Whitney, clerk." "Refiled 15th February, 1870. Geo. E. Whitney, clerk, by L. S. B. Sawyer, D. C."

136 *Judgment.*

In the United States circuit court, ninth circuit, district of California.

GEORGE ALEXANDER *vs.* M. ROULET ET AL. } No. 582.

This cause having come on regularly for trial on the 1st day of December, A. D. 1869, being a day in the October term, 1869, of said court, before the court, Honorable Matthew P. Deady, judge, presiding, and a jury of twelve men, duly empanelled, W. H. Patterson and S. Heydenfeldt, esq'r's, appearing for plaintiff, and McAllisters & Bergin, esq's, and E. B. Mastick, esq., for the defendants, Wheeler Martin, J. P. Fuller, Henry A Gullixson, John G. Nelson, James S. Kennedy, Timothy Ellsworth, Abraham Anderson, Edward Phillips, James W. Simson, Henry Cromer, The Hillside Homestead Association, Michael O'Brien, sued by the name of John Doe; John Landers, sued by the name of John Doe 2d; Anna J. Lindenberger, sued by the name of John Doe 3d; R. K. Rogers, sued by the name of John Doe 4th; Frederick K. Mayer, sued by the name of John Doe 5th; Isaac E. Davis, and George F. Sharp,

137 the cause having previously, on motion of plaintiff's attorneys, been dismissed as to the defendants Alvinza Haywood, D. W. Perley, and Thomas Bell, without costs to either party, and the trial of said action having proceeded upon the first, second, and third days of said December, 1869, upon which last day the parties having by written stipulation filed in the cause consented to the further trial of the action by the court, sitting without a jury, and the jury having been thereupon discharged, and the trial having further proceeded upon the fourth and sixth days of said December, 1869, upon which last-named day, after having heard all the proofs of the respective parties, and the arguments of counsel, the cause was submitted for consideration and decision. And the court upon due consideration having on the 11th day of the same December, filed its written findings of fact and conclusions of law; and the said defendants, by their said counsel, McAllisters and Bergin, esq'r's, having on the 9th day of February, 1870, being a day in the February term, 1870, obtained a rule on the plaintiff to show cause why judgment should not be entered in favor of said defendants upon said findings, and said rule having, on the 15th day of said February, come on to be heard before the court, Honorable Lorenzo

138 Sawyer, circuit judge, presiding; and the court having, after hearing counsel for the respective parties, ordered as follows, the counsel of plaintiff thereto consenting, that the findings of fact and conclusions of law, endorsed "Filed 11th December, 1869, Geo. E. Whitney, clerk," and signed "Deady, J," be and the same are adopted by the court, as the findings of fact and conclusions of law of the court in the above-entitled cause, and the same is hereby ordered to be refiled,

as of this date, and judgment is ordered for defendants, who answered for their costs and disbursements.

Now, therefore, in consideration of the premises, it is considered and adjudged, that the plaintiff take nothing by his suit against the said defendants, Wheeler Martin, J. P. Fuller, Henry A. Gullixson, John G. Nelson, James S. Kennedy, Timothy Ellsworth, Abraham Anderson, Edward Phillips, James W. Simson, Henry Cromer, The Hillside Homestead Association, Michael O'Brien, John Landers, Anna J. Lindenberger, R. K. Rogers, Frederick K. Mayer, Isaac E. Davis, and George F. Sharp, but that the said defendants go hence without day; and it is further considered and adjudged, that the said defendants recover of said George Alexander, plaintiff, their costs, taxed at two hundred and seventy dollars.

Judgment entered this 15th day of February, A. D. 1870.

GEO. E. WHITNEY, *Clerk*,
By L. S. B. SAWYER, *D. C.*

139 A true copy of the judgment entered in the above-entitled action in Judgment Register No. 1, pages 377, 378, and 379.

GEO. E. WHITNEY, *Clerk*,
By L. S. B. SAWYER, *D. C.*

140 *Bond on appeal.*

In the circuit court of the United States, in and for the district of California.

GEORGE ALEXANDER
v.
M. ROULET ET AL.

Know all men by these presents, that we, William H. Patterson, of the city and county of San Francisco, State of California, and , of the same place, as sureties, and George Alexander, as principal, are held and firmly bound unto M. Roulet, Wheeler Martin, J. P. Fuller, Henry A. Gullixson, John G. Nelson, James S. Kennedy, Timothy Ellsworth, Abraham Anderson, Edward Phillips, James W. Simson, Henry Cromer, The Hillside Homestead Association, Michael O'Brien, sued by the name of John Doe; John Landers, sued by the name of John Doe 2d; Anna J. Lindenberger, sued by the name of John Doe 3d; R. R. Rogers, sued by the name of John Doe 4th; Frederick K. Mayer, sued by the name of John Doe 5th; Isaac E. Davis and George F. Sharp, as obligees, in the sum of one thousand dollars, to be paid to the said obligees, their executors or administrators; to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated the seventh day of May, A. D. 1870.

141 Whereas the above-named George Alexander hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the 9th circuit, district of California:

Now, therefore, the condition of this obligation is such that if the above-named George Alexander shall prosecute the said writ of error to effect and answer all damages and costs, if he shall fail to make good

his plea, then this obligation to be void; otherwise the same shall be and remain in full force and virtue.

GEORGE ALEXANDER, [SEAL.]
By W'M H. PATTERSON, [SEAL.]
His Att'y in Fact.
W'M H. PATTERSON. [SEAL.]

Sealed and delivered in presence of—

(Endorsed:)

I hereby approve the form of the within bond, and the sufficiency of the surety thereon.

Dated May 12th, A. D. 1870.

(Signed) LORENZO SAWYER,
Circuit Judge.

Filed this 12th day of May, 1870.

GEO. E. WHITNEY, *Clk*,
By L. S. B. SAWYER, *D. C.*

142 *Citation and affidavit of service.*

UNITED STATES OF AMERICA, *ss:*

To M. Roulet, Wheeler Martin, J. P. Fuller, Henry A. Gullixson, John G. Nelson, James S. Kennedy, Timothy Ellsworth, Abraham Anderson, Edward Phillips, James W. Simson, Henry Cramer, The Hillside Homestead Association, Michael O'Brien, sued by the name of John Doe; John Landers, sued by the name of John Doe 2d; Anna J. Lindenberger, sued by the name of John Doe 3d; R. R. Rogers, sued by the name of John Doe 4th; Frederick K. Mayer, sued by the name of John Doe 5th; Isaac E. Davis, and George F. Sharp, defendants, and to E. B. Mastick, esq., and McAllisters and Bergin, esq's, solicitors or attorneys for said defendants, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of California, ninth circuit, wherein George Alexander is plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Lorenzo Sawyer, judge of the circuit court of the United States for the district of California, ninth circuit, on the 12th day of May, 1870.

(Signed) LORENZO SAWYER,
Circuit Judge.

143 (Endorsed:)

Service of the within is hereby admitted this 12th day of May, 1870.

McALLISTERS & BERGIN, *for Def'ts.*
E. B. MASTICK, *for Def'ts.*

UNITED STATES OF AMERICA,
State of California, City and County of San Francisco, ss:

Joseph P. Phelan, being duly sworn, deposes and says that he is over

as of this date, and judgment is ordered for defendants, who answered for their costs and disbursements.

Now, therefore, in consideration of the premises, it is considered and adjudged, that the plaintiff take nothing by his suit against the said defendants, Wheeler Martin, J. P. Fuller, Henry A. Gullixson, John G. Nelson, James S. Kennedy, Timothy Ellsworth, Abraham Anderson, Edward Phillips, James W. Simson, Henry Cromer, The Hillside Homestead Association, Michael O'Brien, John Landers, Anna J. Lindenberger, R. K. Rogers, Frederick K. Mayer, Isaac E. Davis, and George F. Sharp, but that the said defendants go hence without day; and it is further considered and adjudged, that the said defendants recover of said George Alexander, plaintiff, their costs, taxed at two hundred and seventy dollars.

Judgment entered this 15th day of February, A. D. 1870.

GEO. E. WHITNEY, *Clerk*,
By L. S. B. SAWYER, *D. C.*

139 A true copy of the judgment entered in the above-entitled action in Judgment Register No. 1, pages 377, 378, and 379.

GEO. E. WHITNEY, *Clerk*,
By L. S. B. SAWYER, *D. C.*

140 *Bond on appeal.*

In the circuit court of the United States, in and for the district of California.

GEORGE ALEXANDER
v.
M. ROULET ET AL.

Know all men by these presents, that we, William H. Patterson, of the city and county of San Francisco, State of California, and , of the same place, as sureties, and George Alexander, as principal, are held and firmly bound unto M. Roulet, Wheeler Martin, J. P. Fuller, Henry A. Gullixson, John G. Nelson, James S. Kennedy, Timothy Ellsworth, Abraham Anderson, Edward Phillips, James W. Simson, Henry Cromer, The Hillside Homestead Association, Michael O'Brien, sued by the name of John Doe; John Landers, sued by the name of John Doe 2d; Anna J. Lindenberger, sued by the name of John Doe 3d; R. R. Rogers, sued by the name of John Doe 4th; Frederick K. Mayer, sued by the name of John Doe 5th; Isaac E. Davis and George F. Sharp, as obligees, in the sum of one thousand dollars, to be paid to the said obligees, their executors or administrators; to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated the seventh day of May, A. D. 1870.

141 Whereas the above-named George Alexander hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the 9th circuit, district of California:

Now, therefore, the condition of this obligation is such that if the above-named George Alexander shall prosecute the said writ of error to effect and answer all damages and costs, if he shall fail to make good

his plea, then this obligation to be void; otherwise the same shall be and remain in full force and virtue.

GEORGE ALEXANDER, [SEAL.]
By W'M H. PATTERSON, [SEAL.]
His Att'y in Fact.
W'M H. PATTERSON. [SEAL.]

Sealed and delivered in presence of—

(Endorsed:)

I hereby approve the form of the within bond, and the sufficiency of the surety thereon.

Dated May 12th, A. D. 1870.

(Signed) LORENZO SAWYER,
Circuit Judge.

Filed this 12th day of May, 1870.

GEO. E. WHITNEY, *Cl'k*,
By L. S. B. SAWYER, *D. C.*

142 *Citation and affidavit of service.*

UNITED STATES OF AMERICA, *ss:*

To M. Roulet, Wheeler Martin, J. P. Fuller, Henry A. Gullixson, John G. Nelson, James S. Kennedy, Timothy Ellsworth, Abraham Anderson, Edward Phillips, James W. Simson, Henry Cramer, The Hillside Homestead Association, Michael O'Brien, sued by the name of John Doe; John Landers, sued by the name of John Doe 2d; Anna J. Lindenberger, sued by the name of John Doe 3d; R. R. Rogers, sued by the name of John Doe 4th; Frederick K. Mayer, sued by the name of John Doe 5th; Isaac E. Davis, and George F. Sharp, defendants, and to E. B. Mastick, esq., and McAllisters and Bergin, esq's, solicitors or attorneys for said defendants, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of California, ninth circuit, wherein George Alexander is plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Lorenzo Sawyer, judge of the circuit court of the United States for the district of California, ninth circuit, on the 12th day of May, 1870.

(Signed) LORENZO SAWYER,
Circuit Judge.

143 (Endorsed:)

Service of the within is hereby admitted this 12th day of May, 1870.

McALLISTERS & BERGIN, *for Def'ts.*
E. B. MASTICK, *for Def'ts.*

UNITED STATES OF AMERICA,
State of California, City and County of San Francisco, ss:

Joseph P. Phelan, being duly sworn, deposes and says that he is over

the age of twenty-one years; has no interest in the result of the action of George Alexander vs. M. Roulet et als., referred to in the foregoing citation, and is legally competent to be a witness therein; that he did, on the 12th day of May, A. D. 1870, at the city and county of San Francisco aforesaid, personally serve the foregoing citation upon Messrs. McAllisters and Bergin, attorneys and solicitors for the defendants in error in said action, by delivering to and leaving with Hall McAllister, esq., (a member of said firm of McAllisters & Bergin,) a true copy of said citation, at the same time exhibiting to him the original thereof; that said McAllister did then and there, in the presence of deponent, subscribe the name of "McAllisters & Bergin" to the admission of service endorsed on said citation; that deponent did also at said time and place, personally serve the foregoing citation upon E. B. Mastick,
144 esq., an attorney or solicitor for the defendants in error in said cause, by delivering to and leaving with said Mastick a true copy of said citation, at the same time exhibiting to him the original thereof; that said Mastick did then and there, in the presence of deponent, subscribe with his name the admission of service endorsed on said citation.

And further deponent saith not.

JOS. P. PHELAN.

Subscribed and sworn to before me this 12th day of May, A. D. 1870.

L. S. B. SAWYER,
Commissioner U. S. Circuit Court, Ninth Circuit, Dist. of Cal.

(Endorsed:) "Citation and affidavit of service. Filed May 12th, 1870. Geo. E. Whitney, cl'k, by L. S. B. Sawyer, D. C."

145 UNITED STATES OF AMERICA,
District of California, ss:

I, George E. Whitney, clerk of the circuit court of the United States, ninth circuit, district of California, hereby certify that the foregoing one hundred and forty-four written pages, numbered from 1 to 144, both inclusive, are a true transcript of the record and proceedings in the cause therein entitled, and that the same together constitute the return of the writ of error hereto annexed.

In testimony whereof I have hereunto set my hand and the seal of said circuit court, this 14th day of May, in the year of our Lord one thousand eight hundred and seventy, and of our independence the ninety-fourth.

[SEAL.] GEO. E. WHITNEY, *Clerk.*

(Indorsement on cover:) No. 309. George Alexander, plaintiff in error, vs. M. Roulet, Wheeler Martin, J. P. Fuller, et al. California C. C. U. S.

Filed 23 November, 1870.

No......

IN THE SUPREME COURT

OF THE UNITED STATES.

GEORGE ALEXANDER,

VS.

M. ROULET ET AL.

SAN FRANCISCO:
EXCELSIOR PRESS, BACON AND COMPANY, PRINTERS,
No. 536 Clay Street, just below Montgomery.
1870.

IN THE SUPREME COURT

OF THE

UNITED STATES:

GEORGE ALEXANDER

vs.

M. ROULET ET AL.

1. Power of Prefects to grant Pueblo Lands.

This power was conferred on the Prefects by the Decree of March 20, 1837, Art. 77, the translation of which is as follows:

"Art. 77. They (the Prefects) shall regulate, executively and conformably to the law, the distribution of the common lands of the Pueblos of their Districts, provided there be no lawsuit pending in the Courts respecting the same; but this shall be without prejudice to the rights of the interested parties to apply to the Governor, who, with the concurrence of the Departmental Junta, shall make such determination as may be thought most expedient."

The original and translation of this Article of the Decree will be found in "Dwinelle's Colonial His-

tory of San Francisco," Addenda No. 44, page of Addenda 314.

The term "regulate executively the distribution," has a wider significance than the term "grant," and necessarily includes it. Under this power the Prefect might direct an Alcalde, a Justice, or a private person, to make the conveyance of a town lot; *a fortiori*, he might make it himself—there can be no moral logic in denying him the power to do what he can order another to do. The common sense of the civil law looks at the substance and disregards the shadow.

The law has had a practical construction by the custom of Prefects in making grants of Pueblo lands under the Mexican Government.

There are probably more than a hundred such grants in California. On the trial of this cause, seven copies of such grants in San Francisco were shown fromthe archives. We have also printed as an appendix to this brief certificate of the Record keepers in San José and Monterey, which were used upon the argument, showing numbers of such grants in those places; and these examples could have been multiplied had it been deemed necessary, but already some of these grants had been confirmed. The opinion of the Land Commissioners in Larios *vs.* The United States had carefully considered the question and affirmed the power.

In Sherbach *vs.* The United States, Judge Hoffman allowed his preconceived construction against the power to be controlled by the recognized use of it under the Government which made it.

In Dwinelle's Addenda No. 45, is printed the Prefect Grant to Guerrero, which has been confirmed, and is reported in 1 Hoffman's Rep. 97.

In Dwinelle's Addenda, No. 160, is printed the title papers in the case at bar, in full. And in a note commenting on this case, the learned author says: "It was therefore only because these lands were Pueblo lands, that Prefect Hawes thus assumed to distribute them as charged with that function by the laws of Cortez of 1813, which as a merely municipal law had survived not only the Mexican revolution, but also the conquest of the country by the Americans."

2. Change of Government.

The change of Government produced no change in the civil administration, nor in the power of municipal officers in the execution of the law. All the civil laws of a conquered territory remained in force until altered or abolished by the conqueror.

Am. Ins. Co. *vs.* Carter, 1 Peters R. 542; Fleming *vs.* Page, 9 Howard R. 603; Cross *vs.* Harrison, 16 How. R. 164.

Here the civil administration and organization was affirmatively and most explicitly continued.

See Dwinelle's Colonial History, pp. 87 et seq.; General Smith's letter to the San Francisco Legislative Assembly; Exec. Doc. No. 17, 1st Sess. 31st Cong., House, p. 735; Proclamation of Governor Riley; Dwinelle's Addenda No. 74; Letter of Halleck, Secretary of State, to the Judges of Election; Dwinelle's Addenda No. 75.

The doctrine of the continued operation of the civil laws of a conquered territory is founded upon the necessity of the case as well as upon its justice. No exception, then, ought to be made against the operation of those provisions of the law which regulate the administration and disposition of lands dedicated for the foundation of a town, and especially of a growing and important commercial port. If the ground of "necessity" is the pervading reason in any given case, it becomes far more imposing and controlling under the circumstances which existed in San Francisco in the first few years of its occupation by Americans. From 1848 up to the repeal of the Mexican laws in the Spring of 1850 by the first and unrecognized Legislature of California, the barren shores of the present city increased from a mere straggling hundred of inhabitants to a population of forty thousand, transacting a commercial business amounting to millions. Never in the history of the world was there an occasion where the necessity of continued land distribution was so inexorable. The wants of a rapidly

growing city, the erection of buildings at a most fabulous cost for labor and materials, the demand of a civilized status of ownership to supply the securities required by trade, all combined to impress both rulers and people with the conviction that the existing laws were made and continued in force to subserve these important purposes, and that they were abundantly sufficient. They were submitted to with unhesitating obedience, and they were enforced by the military rulers of the country. Day after day grants of town lots were made by Alcaldes and Ayuntamientos, within the knowledge and under the eyes and sanction of the authorities which had been placed by the Government at Washington in the supreme control of the destinies of this coast. No other single law was of half the importance. No other bore an approach to the attribute of "necessity," which was so strong a characteristic of the Mexican law regulating the distribution of the common lands of the towns.

The only officers known were Mexican officers; their Spanish names still adhered to them, although they were filled by American citizens. Their functions were those conferred by Mexican law, none of which had been repealed or modified, and the burden must be upon those who assert it, to show the reason why these officers could not legally exercise the power in question.

Grants by Alcaldes have been uniformly recog-

nized to be valid by both State and Federal Courts, and yet Alcaldes exercised the power of grant, not by virtue of any Pueblo or town ordinance or resolution, but by authority conferred directly by the Supreme Government, in the same manner as it was conferred on the Prefects, so that in this respect Alcaldes were no more town or municipal officers than were the Prefects. They were both agents of the civil administration, to perform a great and necessary function—that of distributing the lands of a Pueblo for the purpose of building it up. Neither derived any power from the towns, directly or indirectly, and it would seem to follow as an undeniable corollary that, if the one was good as conferring title derived from the Pueblo, (or it may be more proper to say, derived from the Pueblo dedication) the other must be equally good, each to the extent of the authority conferred by law; and it would also seem to follow that, after the American conquest, both offices being continued in operation under the existing laws, if Alcaldes could continue to grant with effect, so could Prefects. The distinction made by the Court below between the power of a Mexican Prefect and an American Prefect seems to us to be without any sound reason.

3. As to the Necessity of Presenting this Claim to the Land Commission for Confirmation.

The right of presenting this claim before the Land Commission does not exist by the terms of

the Act of March 3d, 1851, "An Act to ascertain and settle private land claims in the State of California."

Section 14 of that Act provides "that the provisions of this act shall not extend to any town lot, farm lot, or pasture lot held under a grant from any corporation or town to which lands may have been granted for the establishment of a town by the Spanish or Mexican Government, or the lawful authorities thereof, nor to any city or town or village lot, which city, town or village existed on the 7th July, 1846, but the claim for the same shall be presented by the corporate authorities of the town."

By fair construction the lot here in question will come under the first description, as, incontrovertibly, it also comes under the second class.

It must be considered as held under a grant from a corporation or town. It is so held as much as any other. Literally speaking, no lot in California, or any part of Mexico, under the Mexican Government, was held under a grant from a town; for the towns *qua* towns, had no power to grant, but only certain officers of both the towns and districts were invested with the right to grant town lots by the general law of the Supreme Government.

Therefore, if a literal interpretation of the clause referred to were to be the rule, the clause would be made to mean nothing; that is, to be altogether ineffective.

The universal rule as to the construction of statutes will not permit this interpretation. It must be presumed the law-maker knew the existing condition of the subject matter of legislation, and intended to provide sound beneficial regulation.

The words "held under a grant from" must be construed to mean "holding title through or under the grant to any corporation or town," for such was the true condition of the title to all town lots, at least in San Francisco.

But, if this Court declines this interpretation, then the present title must come under the next class of exemption from presentation to the Land Commission, to wit: "Nor to any city, or town, or village lot, which city, town or village existed on the 7th July, 1846."

That San Francisco, as a Pueblo, existed at that date, must be judicially known to the Court; and the finding of facts in the record sufficiently proves it. That single fact excludes the claim from the necessity or right of presentation to the Land Commission. and should be a complete answer to the argument in favor of it.

But it has been replied, that decisions already made hold that grants of Pueblo lots by Governors ought to have been presented to the Land Commissioners, and therefore, by analogy, the grants by Prefects should have taken the same course.

But here the analogy will not hold. Governors, although authorized to grant Pueblo lands, had also authority to grant any and all the lands of the public domain; while, on the other hand, Prefects had no power of grant, excepting that of granting Pueblo lands.

The grant of a Governor would be good, even if the land did not belong to a Pueblo; the grant of the Prefect is only good if the land granted is the property of the Pueblo.

Supposing a Prefect's grant presented to the Land Commission and confirmed, and afterward the grant to the particular Pueblo is rejected; this latter fact would make it conclusive that the Prefect's grant was invalid, and ought not to have been confirmed, because his power to grant was limited to Pueblo lands, and there were no Pueblo lands.

Now in this case the confirmee of the Prefect grant would have no title, in spite of his confirmation. He would have a conclusive judgment against the government, which might bar it from an entry, and protect his possession; but really and truly he would hold only by estoppel, and not by title; a result differing in its most essential features from that of a grant by a Governor, which vests title in the grantee, whether there be a Pueblo or not.

Hence it follows that the first test of the validity of a Prefect's grant is the confirmation or rejection of the claim of the Pueblo in which the grant lies. In other words, it is so entirely dependent upon the fate of the Pueblo claim, that it would be an act of supererogation to present it for adjudication before a Commission established merely to separate the lands of private owners from those of the Government. That separation is effected in this case by the confirmation of the Pueblo claim, and it must be immaterial to the Government as to the ownership of lands the right to which she has already disclaimed. To investigate a Prefect grant of town lots by a Commission would afford no protection to the Government ; as, if there be a Pueblo, she must give up all its lands to its use : while on the reverse, as I have illustrated, it may be detrimental to the Government, where there is a confirmation of the Prefect grant, and a rejection of the Pueblo claim.

But, if there was ever anything in this point as to the necessity of going before the Land Commission, the terms of the decree of confirmation of the Pueblo claim would seem to have condoned the omission.

In the case of City of San Francisco *vs.* The United States, the decree concludes as follows :

"This confirmation is in trust for the benefit of the lot holders under grants from the Pueblo, town

or city of San Francisco, or *other competent authority*, and, as to any residue, in trust for the use and benefit of the inhabitants of the city."

This looks like leaving but one question to be determined: "Was the grant of the Prefect under competent authority?"

4. The Effect of the Van Ness Ordinance.

The findings show the land in controversy to be within the territory described in the Van Ness Ordinance, which relinquishes and grants to the possessors, under certain conditions, the right and claim of the city.

But we insist that if the Prefect had the authority to make the grant in question, neither the Ordinance of the City nor its confirmation by the State or the United States could take away the right of the grantee or his assigns. If the lands were found to be Pueblo lands, then they had already been properly granted by the Prefect, and the city had no right in them to give away. Besides, the first possessor was the grantee, and it was his or his assign's possession which had been interrupted by the entry of the defendants, and the land may have been recovered from them (the defendants) by legal process. So that this condition in the 2d Section of the Ordinance makes the claim under the Ordinance ineffectual for the defendants.

But if there should be any doubt about that position, then we point to the 9th Section of the Ordinance, which provides an express saving clause which protects the claim at bar from its operation. Section 9 says: "Although the City hereby renounces in favor of the actual possessors, in accordance with the provisions of Section 2, any right or claim of its own, nothing in this Ordinance is intended to prejudice any other outstanding title to the said lands adverse to the said possessors."

It is palpable that the entire object of the Ordinance was not to affect or operate on any paper title or real claim of title, but only to give some assurance of title where there existed but a naked possession.

5. The Statute of Limitations.

The conclusions of law in the Court below, as appears in the record, bar the plaintiff by the California Act of April 11, 1855. See Stats. 1855, p. 109.

But the limitation in that Act is expressly five years after the confirmation of the claim by the Government of the United States. Unless the Court below reached the opinion that the Van Ness Ordinance gave title to the defendants as against the plaintiff, there can be no pretense for applying this statute as a bar to the plaintiff's claim.

But there is another amendatory Act of Limitation, passed April 18, 1863. See Acts of 1863, p. 325. That, however, amends the original Limitation Act of April 22, 1850, but does not attempt to alter the provisions in the amendatory Act of 1855; nor does it repeal the latter, but only such Acts as are inconsistent or in conflict with its provisions. The provision in Section 6 of the Act of 1863 refers to a specified case—that of a claim derived from the Mexican Government, which had not been confirmed five years before the passage of the Act, and giving such claims five years after the passage of the Act to begin suit. This was intended only as an extra piece of liberality in favor of that class of cases, as really it would operate in those cases which had been confirmed five years to give them five years more in which to bring suit. Indeed, it is obvious and true that the amendatory Act of 1863 was gotten up specially for the benefit of the particularly described cases, as the provisions of the Act affect no other, and were altogether useless except for the purpose of giving an additional lease of life to the cases mentioned.

Nothing is said in the Act of '63 about the cases which have not been confirmed at all. They are left, as a matter of course, to the unaffected Act of 1855.

It was, therefore, clearly not the intention of the Legislature of California to cut off claimants

of unconfirmed Mexican grants from any day in Court whatever; and if such had been intended, it would have been illegal, invalid, and void; and this because it would have interfered with the Government in the performance of its treaty obligations, and *pro tanto* would have been a violation of the treaty.

But, moreover, such a law would be an interference with the power of the Government in the primary disposal of the title to the public lands. And we here insist that there is no substantial difference between the ordinary sale of public land and the confirmation of an inchoate grant passing to the claimant the legal title, when before such confirmation it had no standing in a Court of law.

Upon the subject of interference of this kind, this Court has been very pronounced.

In Jourdan *vs.* Barrett, 4 How. 169, the conclusion of the opinion declares: "Having the power of disposal and of protection, Congress alone can deal with the title, and *no State law, whether of limitations* or otherwise, can defeat such title."

Wm. Irvine

S. Heydenfeldt

Of Counsel for Plff. in Error

No.

IN THE SUPREME COURT

OF THE

UNITED STATES.

GEORGE ALEXANDER,

vs.

M. ROULET, ET AL.

BRIEF FOR DEFENDANTS IN ERROR.

HALL McALLISTER,
Counsel for Defendants in E

1871

IN THE SUPREME COURT

OF THE

UNITED STATES.

GEORGE ALEXANDER,
Plaintiff in Error.

vs.

M. ROULET, ET AL.,
Defendants in Error.

STATEMENT OF THE CASE.

This is a writ of Error to the Circuit Court of the Ninth Circuit, District of California.

The action was ejectment, to recover a parcel of land in the city of San Francisco, State of California. The complaint alleges title in fee, and the answers deny generally the allegations of the complaint, and set up the statute of limitation. After partial trial before a jury, the cause was, by stipulation, finally tried by the Court sitting without a jury.

The Court found, that from and after August, 1849, to, and inclusive of January 12, 1850, by a virtue of an appointment from the then military governor of the then Territory of California, and an

election by the people of the district, Horace Hawes was acting as the Prefect of the district, embracing the then Pueblo, now city of San Francisco, and while thus acting, upon due petition therefor, he granted on January 12th, 1850, to Ed ard Carpenter, then a resident of the former Mission Dolores, the premises in controversy; that the title of Carpenter, thus acquired on and before April 12th, 1868, became vested in the plaintiff; that these premises are within the limits of the said Pueblo, now city of San Francisco; that in the month of July, 1852, the city presented a claim for said Pueblo lands, to the Board of Land Commissioners, organized under the Act of Congress of March 3d, 1851, entitled "An Act to ascertain and settle private land claims in the State of California," and on December 24th, 1854, the Board confirmed the claim, the confirmation including the premises in controversy; that an appeal was taken from the decree of confirmation to the U. S. District Court, from which Court the case was duly transferred to the Circuit Court, where the claim was again confirmed on May 18th, 1865, from which last decree of confirmation an appeal was duly taken to this Court, and on February 4th, 1867, the mandate of this Court, in all respects confirming the decree of the Circuit Court, was filed in the last named Court; that the premises in question are within the limits and part of the lands described in the so-called Van Ness Ordinance, which was ratified by the Legislature of the State of California, March 21st, 1858 that on January 1st, 1855, the defendants were in

the possession of these lands, and that their possession was open, notorious, and adverse to all the world, and that the defendants were vested with all title thereto, conferred by the Van Ness Ordinance, and the provisions of the Act of Congress of July 1st, 1864, entitled "An Act to expedite the settlement of titles to lands in the State of California."

As conclusions of law, the Court found that each Prefect of California, while the same was part of the Mexican Territory, was authorized and had power, by virtue of Article 77, of the decree of March 20th, 1837, to make grants of the common and unappropriated lands of the Pueblos within their jurisdiction. but that from and after the conquest and acquisition of the country by the United States, the Prefect ceased to have such power and authority, and, as a consequence, that the grant of Prefect Hawes was void; that under the Mexican laws, and laws in force in California, the Prefect was not a municipal or Pueblo officer, and that grantees of lands granted by a Prefect within the limits of a Pueblo, did not derive title from, or hold under the Pueblo, but from and under the general government, of which the Prefect was a subordinate and representative, and that, therefore, the confirmation of the Pueblo claim did not enure to the benefit of the plaintiff; that persons claiming title under Prefect grants, made subsequent to the conquest and acquisition of the country by the United States, do not derive title thereto under Spanish or Mexican government, and are not within the purview of the treaty of Guadalupe Hidalgo, or the Act of Congress to as-

certain and settle private land claims in the State of California; that the plaintiff was barred under the statute of limitations, and was not entitled to recover.

The questions thus presented for decision upon the record are :

1. The Power of Prefects to grant Pueblo Lands.

2. If Prefects had the Power to grant Pueblo Lands, did their Power determine with the conquest and cession of the country ?

3. Were Prefects Pueblo Officers? and do Grantees under Prefect Grants derive title under the Pueblo ?

4. Do the Van Ness Ordinance and the Act of Congress vest the title to the demanded prem'ses in the defendants.

5. Is the Statute of Limitations a bar to the present action.

These questions we shall consider in their order.

I.

The Power of Prefects to grant Pueblo Lands.

The source and nature of the title of Pueblos to their lands have been so freqently considered and judicially declared, that it is only necessary to refer to a few of the leading decisions on the subject.

Townsend vs. *Greeley*, 5 Wall. U. S. 336.
Grisar vs. *McDowell*, 6 id. 372.
Hart vs. *Burnett*, 15 Cal. 554.

The authority of Prefects to grant these lands is claimed under Article 77 of the Act of March 20, 1837. The Act itself is a general law entitled provisional regulations for the internal government of the departments. It prescribes the qualifications, tenure of office, mode of election, and the powers and duties of the Governors, their Secretaries, Departmental Juntas, Prefects, Sub-Prefects, Ayuntamientos, Alcaldes and Justices of the Peace. Enumerating the powers and defining the duties of Governors, it expressly provides that, with the previous consent of the Departmental Junta, they may, in certain cases, authorize the Ayuntamientos to alienate the propios and arbitrios of Pueblos.

It is not, we believe, pretended that this Act conferred upon Governors any other power in reference to the alienation of Pueblo lands than that which we have mentioned. While Governors did in fact grant Pueblo lands, and the validity of their grants has been judicially sanctioned, their power to grant has never been based upon this Act of March 20, 1837, but on the contrary, has been sustained upon general principles of presumption, and the Act of January 4, 1813, of the Spanish Cortes.

Brown vs. *City of San Francisco*, 16 Cal. 451.
Leese vs. *Clark*, 18 Cal. 573.
U. S. vs. *Pico*, 5 Wall. (U. S.) 540.
Dwinelle's Colonial History of San Francisco, pages 54–81.

The Act very minutely specifies the powers of the Departmental Junta, providing (Art. 45, sec. 8)

that it should examine and approve the accounts rendered of the propios and arbitrios, but it gives even that body no express authority to alienate any part of the Pueblo lands.

In articles 80 and 81 of the law, express provision is made for Prefects to exercise supervision over the propios and arbitrios, in accordance with the ordinances of the Ayuntamiento, and Article 107 gives the same power to Sub-Prefects. This supervision was, however, only such as was prescribed in these ordinances. But no power is vested even in the Ayuntamiento under the Act, to dispose of any part of the Pueblo lands except where expressly authorized to do so by the Governor, with the consent of the Departmental Junta.

In truth, we are not aware that power to alienate Pueblo lands was ever claimed for any of these officers or departments of the Government, under this Act, except Prefects. That the authority to dispose of them must be sought elsewhere is manifest from the express language of Article 77 itself, directing the Prefects to regulate executively and in conformity with the laws, (*conforme a las leyes*) the distribution of the common lands. Laws, therefore, other than the Act itself, must have existed in conformity to which the Prefects were to executively regulate the distribution of the common lands of the Pueblos. Let us see, then, if Article 77 empowers Prefects to grant.

The text of the article is:

"Arreglaran gubernativamente y conforme a las leyes el repartimiento de tierras comunes en los

Pueblos del distrito, siempre que sobre ellas no haya litigio pendiente en los tribunales, quedando a los interesados su derecho a salvo para occurir al gubernador, quien sin ulterior recurso decidera lo mas conveniente, de acuerdo con la junta departmental ;" which may be rendered :

"They shall regulate executively, and in accordance with the laws, the distribution of the common lands in the Pueblos of the district, provided no litigation concerning them is pending in the Courts, reserving to the interested parties the right to appeal to the Governor, who, without further appeal, with the concurrence of the departmental junta shall decide what is most proper."

The pendency of such litigation is a limitation upon the power of those officers. Whenever or wherever the common lands in the Pueblos of the district were involved in litigation they had no power in the premises, according to the express letter of the law. The limitation clearly indicates the nature of the power, and its subject matter, with which it was intended to vest Prefects. The lands contemplated in the law are evidently the lands in the Pueblos of the district that were farmed out for the purpose of raising revenue to defray the expenses of the government. The extent of these, their tenure, the terms of the leasing and payment of the rent, were all matters concerning which litigation might very readily occur, and the solution of which was very properly left with the Courts. This class of Pueblo lands were inalienable, except with the express sanction of the sovereign.

They were, however, authorized and required to be farmed out to raise revenue for the support and administration of the Government. In reference to these lands, it is that Prefects are authorized to executively regulate the distribution. This is the more obvious from the provision of the law requiring such distribution to be made in conformity with *the pre-existing laws—conforme a las leyes.*

Then, again, the action of the Prefects was not final in the premises; the interested parties were allowed the right of appeal to the Governor, who without further recourse, was, in conjunction with the Departmental Assembly, to decide what was most proper, evidently contemplating cases in which disputes had arisen in reference either to the respective rights of the parties or the propriety of the action of the Prefect in regard thereto.

In regard to these alone could there be any possibility of conflicting private rights, and it was their distribution alone that under this law the Prefects were to executively regulate.

Had it been intended to confer upon Prefects the power to grant Pueblo lands the intention would, doubtless, have been expressed in language apt for the purpose. This is clear from Article 9 of the same law, where express authority is given to the Governor, with the consent of the Departmental Assembly, to authorize the alienation of the *propios* and *ejidos*. That this law did not confer on Prefects the power to grant Pueblo lands was the opinion of the eminent jurist who so exhaustively considered the entire law relating to the origin,

nature of the title, and manner of disposing of Pueblo lands, in *Hart* v. *Burnett*, 15 Cal. 576:

"If Prefects were authorized," says he "to grant lands in private ownership—a point we do not decide—*that power is not expressly given by the Act of March* 20, 1837."

In the case of the *U. S.* vs. *Manuel Larios*, before the Board of Land Commissioners under the Act of Congress to which reference has been made by counsel for the plaintiff in error, the Governor himself had authorized and directed the grant there in question, and the opinion of Judge Hoffman in *Sherreback* vs. *U. S.*, upon which so much reliance is apparently placed, we subjoin to this brief that the Court may see how forcibly it sustains the power here claimed, and in the same connection we beg to add extracts of notes from the pen of Major General Halleck upon the decision in *Hart* vs. *Burnett*, 15 Cal., 576, in which the question of the power of Prefects to grant Pueblo lands is discussed. Thoroughly acquainted with the Spanish language and deeply versed in the land laws of Spain and Mexico, which it was the business of his life to study and administer executively and professionally, from the occupation of California by the Americans, there are few living jurists whose opinion upon the point is justly entitled to so much weight as is the opinion of General Halleck.

All the instances of Prefect grants presented to the Board of Land Commissioners under the Act of Congress of March 3, 1851, to ascertain and

settle private land claims, are numbered upon the docket of the Commissioners, as follows, viz: Number 297, 607, 617, 619, 554, 753, 795, 229. Upon examination of the grants presented in these cases, the Court will perceive that with the exception of the cases where the Castros made them, they were in every instance made under the direction of the Governor. Governor Alvarado, testified that under instructions from the Governor Prefects might grant, but that he knew of no instance in which such power was exercised, in absence of special or general instructions to that effect, by virtue of the Act of March 20, 1837. Also, if our recollection serves us aright, Manuel Castro stands alone as the only Mexican *jurist* or *official* in whose opinion Prefects had power to grant under the Act of March 20, 1837. Were Prefect grants as numerous and of as unquestionable validity as claimed by the learned counsel for the plaintiff in error, it is not a little singular that in the varied and eventful judicial history of California, not one of such grants has received judicial recognition. The case at bar is the first instance in which the validity of such a grant has been presented for adjudication in the past twenty years.

In this connection, we may remark that the decisions of the Board of Land Commissioners upon the question, are not exactly in point.

The Board of Commissioners did not sit as a Court to pass judgment upon the dry and simple question of the legal validity of claims presented for confirmation, but in discharging the treaty

obligations of the Government were expressly charged ~~them~~ to "be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they were applicable," (*United States* vs. *Rocha*, 9 Wall., 646); and accordingly, the test of right to confirmation was not an already perfect or legal title to the land of which confirmation was sought, but the criterion was, had the claimant made such an equitable showing, that had the Mexican Government continued, the claim would, probably, have ripened into a legal title? Perfect grants needed no confirmation, nor could any action of the Board, or of Congress, deprive their owners of the title to property, in the enjoyment of which they were guaranteed alike by the terms of the treaty of Guadalupe Hidalgo, and the Constitution of the United States; but when the rights of the claimant were inchoate and imperfect, depending upon the conscience of the Government, he was required to present his claim, and the Board were bound to confirm it when just and equitable, regardless of strict legal rights, according to the test stated.

Reichart vs. *Felps*, 6 Wall., 165.
Minturn vs. *Brower*, 24 Cal., 659.

Beard vs. *Federy*, 3 Wall., 490; or, as this Court in the *United States* vs. *Rocha*, 9 Wall., 649, express it.

"*If this had taken place under the former government, it cannot, we think, be doubted but that under the Mexican law and usages, this title would have become perfect, and hence, under the treaty and Act of Congress, it is the duty of this Court so to hold.*"

Such a criterion, of course, has no place in an action of ejectment on the common law side of the Circuit Court. However persuasive the equities of a case may be, they will not, in absence of the legal title, authorize a recovery in ejectment. We say, therefore, that for these reasons, the decisions made in cases of application for confirmation of claims under the Act of Congress, have no bearing, and constitute no authority in the case at bar. The action of the officers of the former government may well have justified the Board of Land Commissioners, the District Court, and this Court on appeal, in confirming a claim, but it clearly cannot properly have any controlling influence in the construction of an express and positive law. The question here is not one of confirmation, or refusal to confirm an inchoate, imperfect, equitable claim upon the conscience of the government, but it is a naked question of law—had Prefects the right to grant Pueblo lands under the Act of March 20th, 1837?

We submit that they had not.

II.

If Prefects ever had the power to grant Pueblo lands, it ceased with the conquest.

In the *United States* vs. *Pico*, 23 How. 326, this Court say:

"In the Act of Congress of 1851, and the decisions of this Court, that day (July 7th, 1846) is referred to as the epoch at which the power of the Governor of California, under the authority of Mexico, to alienate the public domain, terminated. Previously to that date the claimant did not acquire a title to the land, nor has he acquired an equitable claim to it by any act done upon the land in the fulfilment of the colonization policy of the State."

In *Field* vs. *Seabury*, 19 How. (U. S.) 330, the lower Court had charged the jury in reference to Alcalde grants made after the conquest, that Alcaldes had not any power to grant the land, and that no estate passed by their grants; and this Court, in commenting upon the charge, say that in this the Court was correct.

In the *United States* vs. *Wilson*, 1 Black 269, this Court, say:

"There is a grant of Pio Pico to the Indian of the same piece of land, dated July 10, 1846; but this was after the conquest of the country by this Government, and adds nothing to the strength or justice of the claim."

In *Stearns* vs. *The United States*, 6 Wall. (U. S.) 590, this Court declare that:

"The 7th of July (1846) has been fixed upon as the point of time at which terminated the authority of the Mexican governor to make alienations of the public domain within the conquered territory. All grants made after that time are void."

In *Mumford* vs. *Wardwell*, 6 Wall. (U. S.) 435, dwelling more at length upon the point, this Court again announce that:

"Mexican rule came to an end in that department on the 7th of July, 1846, when the government of the same passed into the control of our military authorities. Municipal authority was also exercised for a time by subordinate officers, appointed by our military commanders. Such commander was called military governor, and for a time he claimed to exercise the same civil power as that previously vested in the Mexican governor of the Department. By virtue of that supposed authority, General S. N. Kearny, March 10th, 1847, as military governor of the territory, granted to the town of San Francisco all the right, title, and interest of the United States to the beach and water lots on the east front of the town, included between certain described points, excepting such lots as might be selected for Government use. * * * But the power to grant lands or confirm titles was never vested in our military governors; and it follows, as a necessary consequence, that the grant as originally made was void and of no effect. Nothing passed to the town by the grant, and, of course, the doings of the Alcalde, in selling the lot in question, was a mere nullity."

These cases show unmistakably that all authority to alienate the public domain ceased after July 7th, 1846.

In *Woodworth* vs. *Fulton*, 1 Cal. 235, the same doctrine was announced, and the Court there held

the grant of an American Alcalde void on that ground. In *Cohas* vs. *Raisin*, 3 Cal. 434, the case of *Woodworth* vs. *Fulton* was overruled in terms, but, from the statement of the case, it is evident the point was not involved, yet we beg to call attention to the following language of the Court, stating the principles upon which the former decision of the Court was overruled:

"It will be remarked," say the Court, "from what has preceded, that these are not grants of any portion of the public domain made by officers of the conquering power, but are grants of municipal lands, *made by the regularly authorized municipal authorities*, under the laws, usages and customs of the country, which were not changed or interfered with by the military or *de facto* government organized under the laws of war.

"It will not be denied that the Pueblo retained during the war all its rights to municipal lands which had been conferred upon it previous to the war; *and as all grants of land made to it must have been in full property, the right to alienate was incident to ownership.* The fact that this right was exercised by the municipality in its different forms from 1835 to 1850, without question or restriction, would prove the usage and custom in absence of the law.

"The Pueblo had the same right to dispose of its property during the war as a natural person. It is immaterial whether the election or appointment of *these municipal officers* was legal or not, or whether the individuals possessed the legal quali-

fications for holding these offices. They were the *de facto* officers of the town, universally acknowledged, recognized and obeyed as such, and their Acts under the law within the sphere of power connected with the office must be binding."

Cohas vs. *Raisin*, 3 Cal., 452.

Upon this case, we will remark, in passing, that, all subsequent adjudications, including the decisions of this Court, do not hold that "all grants of land made to it (the Pueblo) must have been in full property," but on the contrary, in the language of this Court, declare that:

"It amounted in truth to little more than a restricted and qualified right to alienate portions of the land to its inhabitants for building or cultivation, and to use the remainder for commons, for pasture lands, or as a source of revenue or for other public purposes. This right of disposition and use was, in all particulars, subject to the control of the Government of the country." (*Townsend* vs. *Greeley*, 5 Wall., U. S., 336.)

And in the next place, as we shall hereafter show, Prefects were not municipal officers, were not officers of the Pueblo.

In *Welch* vs. *Sullivan*, 8 Cal. 165, the doctrine of *Cohas* vs. *Raisin* was again discussed by the Chief Justice, although the point presented in the case was merely the right of a purchaser under an execution upon a judgment against the City to recover in ejectment. One of the members of the Court declined to express any opinion upon the correctness of the doctrines of *Cohas* vs. *Raisin*,

while another considered himself bound upon the principle of *stare decisis*.

The next and leading case upon the subject is *Hart* vs. *Burnett*, 15 Cal., 534, already cited. The point presented in the case was the same as that in *Welch* vs. *Sullivan*, 8 Cal. *supra*, that is, the right of a purchaser under execution upon a judgment against the City to recover in ejectment. Upon a most elaborate and exhaustive consideration of the case, the Court held that the lands held by the City under the Pueblo title were not leviable upon execution, and that consequently the purchaser could not recover.

The subsequent decisions of the Supreme Court, owing to State legislation, do not directly present the question of the power of the municipal officers of the Pueblo to grant Pueblo lands after July 7th, 1846.

Vide, An Act to provide for the disposition of certain property of the State of California.

Statutes of Cal. of 1851, p. 309, sec. 2.
Statutes of Cal. of 1853, p. 219.
Statutes of Cal. of 1858, p. 52.
Statutes of Cal. of 1867–8, p. 379.
Statutes of Cal. of 1869–70, p. 353.

These various statutes confirm all grants of lands in San Francisco made by any Ayuntamiento, Town Council, Alcalde or Justice of the Peace prior to July 7th, 1846, or all grants of lots of land lying east of Larkin street and northeast of Johnston street, made by any *Ayuntamiento*, *Town Council* or *Alcalde* of the Pueblo of San Francisco subsequent to that date and prior to the incorpora-

tion of the City by the State of California, but wholly fail in any manner to recognize or affirm the validity of any Prefect grants, nor has there ever been any decision of the Courts, State or Federal, sustaining their validity.

As has already been seen, the grounds upon which the validity of the American Alcalde grants were maintained, were that the Pueblos were owners in full proprietorship of their Pueblo lands, and as incidental to such ownership, possessed the right to dispose of them *through their municipal officers*, and for these reasons these grants were not grants of any portion of the public domain made by the conquering power.

The decisions already cited show that this is an erroneous view of the title of Pueblos to their lands, and an examination of the decree of March 20th, 1837, will show that Prefects were not in any sense Pueblo or municipal officers.

III.

Were Prefects Pueblo Officers?

The Governor appointed one for the capital of every *District*. (Art. 61). They had to be natives or resident citizens of the Department. (Art. 62). They had to take care of the public order and tranquillity in their *Districts*, and see to the execution of the laws therein, (Art. 63), with power to impose fines within the same region. (Art. 64).

They were charged with the supervision of the functionaries of their *District*, and with the decision of all doubts respecting the *elections of Ayuntamientos*. (Art. 65—66).

Aggrieved parties might appeal from their decisions to the Governor. They were required to give the utmost attention to see that primary schools were not wanting in any of the *Pueblos* of the District, (Art. 71), and were to regulate the distribution of common lands of the Pueblos in their *Districts*. (Art. 77).

In the administration and management of the funds of propios and arbitrios they were to exercise the supervision which the ordinances of the *Ayuntamientos* might confer upon them. (Art. 80). They appointed Sub-Prefects and Justices of the Peace for the *Districts*, in public assemblies took precedence of all the authorities of the *District*, (Art. 94), had the right to preside, without vote, over the Ayuntamiento of the capital or any other of the towns of the *District*, and were the ordinary channel of communication between the Governor and the subaltern authorities of the *District*, and were required to reside at the *District* capital. (Arts. 96, 97).

We might further multiply instances clearly showing that their powers, duties and functions related not to a particular Pueblo, but to all the Pueblos in their respective Districts. They were emphatically *District* and *not Pueblo officers*. With propriety it cannot be claimed that they were Pueblo or municipal officers any more than it can be said that a member of this Court is a Circuit Judge, because he may perform Circuit Court duty, or that a State School Superintendent is a district officer because he may exercise supervision over his local district subordinates.

Not being, therefore, Pueblo or municipal officers, their power to grant lands, if any such they ever had, ceased after July 7th, 1846. This must be so. Supposing for the purposes of the argument, that they could grant Pueblo lands, so, also, could the Governor; yet, it will hardly be pretended that after July 7th, 1846, the Governor could grant Pueblo lands any more than any other part of the public domain.

The rule of international law, to which reference is made in *Cohas* vs. *Raisin*, is thus correctly stated in *Hart* vs. *Burnett*, 15 Cal., 559:

"It is a well established principle of international law, that the military occupation of a conquered territory does not, in general, effect any change in the laws of that territory.

"The political connection between the inhabitants and their former Sovereign or State, is interrupted or suspended so long as the occupation continues, and is entirely severed on the completion or confirmation of the conquest, whether by treaty of cession, or otherwise. The right of the conqueror to govern the enemy's territory which he may occupy, is not derived from the constitution or political institutions of his own State, but flows directly from the laws of war, as established by the usage of the world, and confirmed by the writings of publicists, and the decisions of Courts; in fine, *from the law of nations. It is held by the same code, that, although the conqueror may suspend the laws, and entirely displace the former local and civil authorities, or limit or change their powers, this is not usually done, and,*

consequently, that such changes are not to be presumed, but must be proved. Even where the conquest is completed by cession or treaty of peace, although the laws political which bound the country and its inhabitants to the former sovereign, are completely abrogated, the municipal laws of the country continue in force, until changed by the proper authority; *and the existing government and its officers continue to exercise the powers and authority conferred by such laws, so far as they are not inconsistent with the rules expressed, or necessarily implied, of the new sovereign.* Neither military occupation nor complete conquest produces, as a general rule, any change in private property, no matter whether belonging to individuals or municipalities, or by what kind of title it may be held."

Accepting this as a correct statement of the rule of international law, let us see whether there was any suspension, change or displacement of the former laws and authorities. From July 7th, 1846, when the United States took possession of the country, down to May 30th, 1848, when the treaty of cession and peace was concluded, the senior officers in command of the United States army governed the country as military governors. The powers they exercised as such, were of the most unlimited character, and, in many instances, in direct opposition to the laws previously prevailing. They appointed the Secretary and Treasurer of the Territory, (Ex. Doc. No. 17, House Representatives XXXI Congress, First Session, 377); established a Supreme Court, and appointed Judges

(Ibid., 826, 854, 870, 808, 820, 821, 827); Judges of the First Instance (Ibid.. 806); Judge of the Court of Admiralty (Ibid., 291, 292); Alcaldes (Ibid., 287, 295, 306, 316, 394); Collectors of Customs, Harbor Masters, Port Wardens, Surveyors, Indian Agents (Ibid., 379, 654, 655, 660, 784, 295, 296, 377); suspended and removed officers, and filled the vacancies, (Ibid., 474, 458, 564, 759); instituted special tribunals, (Ibid., 384, 395, 414, 505, 539, 407, 570, 571); revised or established municipal governments, authorized, confirmed, or set aside elections (Ibid., 774. 775, 778, 498, 593, 595, 690, 700, 703, 759, 774, 660, 661, 432, 451); granted to foreign bottoms the privileges of American vessels (Ibid., 663, 693, 412, 442); decided under what circumstances vessels were to pay tonnage and revenue (Ibid., 436; abolished Mexican laws and customs (Ibid., 476, 477), as to denouncement of mines; established custom house, port and police regulations (Ibid., 584, 586); promulgated prohibitory laws, attached a penalty to their violation, and determined the Court that should try the offenders (Ib., 584, 586, 437); prescribed the mode and place of trial, the manner of summoning and empanneling juries (Ib., 506); what cases must be tried by jury (Ib., 452), and gave binding instructions to Judges (Ib., 563, 564, 488, 559, 317, 447. But although the military governors assumed and exercised all these, and other powers, they distinctly disclaimed all power to dispose of, or to authorize any one to dispose of land, whether pertaining to Pueblos, or

to the public domain (Ib., 318, 319, 321, 492, 542).

Thus the laws, usages and customs of the country were in fact suspended in many particulars, and altered and displaced in others. And especially were the powers of all officers, including Prefects, to dispose of Pueblo lands or any lands suspended.

It was the civil and municipal law as thus modified, in fact, that remained in force at the conclusion of the peace, and *not the laws of Mexico and California as they existed prior to the commencement of the war.*

This is the view taken by the political department of the Government. In proclaiming peace to the people of California, after stating that Congress would speedily provide them with a suitable Territorial Government and laws, Governor Mason says:

"In the mean time, the present civil officers of the country will continue in the exercise of their functions as heretofore, and when vacancies exist or may occur, they will be filled by regular elections held by the people of the several towns and districts, due notice of such elections being previously given. *The existing laws of the country will necessarily continue in force till others are made to supply their place.*" (Ex. Doc. Supra p. 590.)

The Hon. W. L. Marcy, Secretary of War, addressing instructions to Governor Mason, states that:

"The general positions therein maintained are, that at the conclusion of the treaty of peace be-

tween the United States and Mexico, the military Government which was established in California, under the laws of war, ceased to derive its authority from this source of power; *but the termination of the war left an existing Government, a Government de facto, in full operation; and this will continue, with the presumed consent of the people, until Congress—which has full and exclusive power under the Constitution to organize Governments for Territories—shall provide a Government for them.*" (Ibid 258, 497.)

Halleck's International Law, p. 780, 781, 824, 825, 837, 829 to 838.

When peace was concluded Prefects were not known to the Government *de facto* then existing, nor were they ever afterwards created to dispose of the Pueblo lands. The authorities, both State and Federal, carefully refrain from recognition of any right in American Prefects to grant lands. All other grants are respected, recognized and confirmed, but search will in vain be made for any adoption or sanction of the grants of American Prefects. This affords the most unmistakable proof that, in regard to the power of Prefects to grant Pueblo lands, the conquering power elected to change and abrogate the former laws of the ceded and conquered territory, if those laws ever conferred such power upon those officers.

But supposing that we are in error on this point, and concede, for the sake of argument, the authority of Prefects to grant pueblo lands, failure to present such grants to the Land Commission, for confirmation, is a bar to any right to recover thereon.

That all grants of lands within a Pueblo, not derived directly from the Pueblo, required presentation under the Act of Congress of March 3, 1851, to ascertain and settle private land claims in the State of California, under penalty of forfeiture, has been repeatedly decided.

Leese vs. *Clark*, 18 Cal. 535.
Leese vs. *Clark*, 20 Cal. 388.
Steinbach vs. *Moore*, 30 Cal. 492.
Merle vs. *Dixey*, 31 Cal. 131.
Stevenson vs. *Bennett*, 35 Cal. 429.
Beard vs. *Federy*, 3 Wall. (U. S.) 490.
Lynch vs. *Bernall*, 9 Wall. (U. S.) 321.

If the decision of the Board of Land Commissioners in support of the validity of Prefect grants be authority for that position, it necessarily follows, from the same decision, that the claim should have been presented. If the Board had jurisdiction to pass upon the claim the parties were bound to present it for confirmation.

IV.

Van Ness Ordinance.

The Court below found that the defendants were vested with all the title to the demanded premises conferred by the provisions of the Van Ness Ordinance, and by the provisions of the Act of Congress, entitled "An Act to expedite the settlement of titles to lands in the State of California."

Statutes of Cal. of 1858, p. 52.
13 U. S. Statutes at large, p. 333, sec. 5.

The second section of this ordinance operated as an immediate and direct grant to the persons therein specified of the lands described in the Ordinance. The ninth section does not limit this grant of the city's title. The language, "nothing in this Ordinance is intended to prejudice any *other* outstanding title to the said lands adverse to the said possessors," refers not to title to the lands derived from but adversely to the city. "*Any other outstanding titles*" cannot, with legal or grammatical propriety, refer to the city title as other than that thereby conveyed. This is the more manifest from the fact that in section second of the Ordinance is a confirmation of all previous conveyances of the city title which it was intended to recognize or ratify. This saving clause of the ninth section had exclusive reference to the other numerous adverse titles that were set up to the Pueblo lands. The finding of the Court below is, of course, conclusive in this Court, that the defendants, and those through whom they claim title, were the first possessors within the meaning of the Ordinance. This was a question of fact, as much as the identification of the grantee or premises granted in any other case. Upon this, as upon all other questions of fact, the verdict of a jury, or the finding of the Court, is conclusive in this Court. The grant thus made was certain, definite, and specific; and, ratified as it subsequently was by the Act of Congress, it constituted a full legal title to the demanded premises. The title of the city was, and is still, inchoate, there not having been

any definite location of the land, nor any confirmation of the claim until 1865. Consequently, the grant of the Prefect was equally inchoate and imperfect. In this condition of things it was entirely competent for Congress to grant or confirm the grant of the demanded premises.

Menard vs. *Massey*, 8 How. 294–5–6.
Ham vs. *State of Missouri*, 18 How. 129.
West vs. *Cochran*, 17 How. 416.
Cousin vs. *Blanco*, 19 How. 210.

In truth, under the repeated decisions of this Court, ejectment will not lie in the United States Circuit Court upon this Prefect grant.

Singleton vs. *Touchard*, 1 Black 344.
Meyrs vs. *Greer*, 24 How. 268.
Hooper vs. *Scheimer*, 23 How. 248.
Fenn vs. *Hulme*, 21 How. 486.
Schierburn vs. *Cordova*, 24 How. 425.

V.

Statute of Limitation.

In 1850 the Legislature passed an Act defining the time for commencing civil actions (Statutes 1850, p. 343) and limited the time for the commencement of civil actions for the recovery of real estate to five years. This limitation was general, and applied alike to all titles of every description.

At the October Term of 1852, in the case of *Leese* vs. *Clark*, 3 Cal., 1, the Supreme Court of the State decided that ejectment would not lie in the State Courts upon an unconfirmed and unlocated

Mexican grant. The result was that claimants under Mexican grants, the great mass of which were then unconfirmed, could not maintain any action for the recovery of their lands, and yet the statute of limitations was in the mean time running against them. To remedy this evil the Legislature, in 1855 (Statutes of 1855, p. 109), amended the Act of 1850 by adding a proviso, "that an action may be maintained by a party claiming such real estate, or the possession thereof, under title derived from the Spanish or Mexican Governments, or the authorities thereof, if such action be commenced within five years from the time of the final confirmation of such title by the Government of the United States, or its legally constituted authorities." In *Billings* vs. *Harris*, 6 Cal., 383, and in *Billings* vs. *Hall*, 7 Cal., 3, the same Court decided that this amendment to the Act of 1850 was alone law, and the original section was to all intents legally non-existent, and the time limiting the commencement of real actions dated from the passage of the amendment of 1855, and such is the settled rule of construction (*Clark* vs. *Huber*, 25 Cal., 596).

Subsequently the Supreme Court reconsidered the ruling made in *Leese* vs. *Clark*, and decided that ejectment would lie upon a Mexican grant not finally confirmed, that such grants were not finally confirmed until the issuance of patents thereon, and that the grantees or those claiming under them could recover to the extent of the exterior boundaries of the grant.

Gunn vs. *Bates*, 6 Cal., 263.
Ferris vs. *Coover*, 10 Cal., 589.
Johnson vs. *Van Dyke*, 20 Cal., 229.
Mahoney vs. *Van Winkle*, 21 Cal., 552.
Thornton vs. *Mahoney*, 24 Cal., 569.

As the great mass of the lands in the thickly populated and improved parts of the State were claimed under Mexican grants, many of which were not confirmed, and confirmation of which was, from interested motives delayed by the claimants, parties were thus indefinitely exposed to litigation under Spanish and Mexican grants.

To remedy this evil, the Legislature in 1863 again amended the Statute of Limitations, making the period of limitation in all cases thereafter five years, whether the cause of action were based upon a Mexican grant or otherwise, but at the same time, in order to guard against the consequences of the decisions of the Supreme Court, already referred to, expressly enacted that "the time that shall have already run under the Act to which this is amendatory, when this Act takes effect, shall be taken and computed as a portion of the time in this Act limited for the commencement of an action or the making of a defense thereto." (Statutes 1863, p. 357.)

This period was five years. The plaintiff not having shown any title derived from the Spanish or Mexican Government, he was, of course, properly held barred by the Statute.

The constitutionality of limitation laws is no longer an open question; their validity has been

affirmed in every Court where the question has arisen for adjudication. Citation of the numerous authorities in their support would be a mere affectation of learning, and we shall therefore, merely refer the Court to

Angel on Limitations, § 15.

Cooley, Constitutional, 364 *et seq.*

Tyman vs. *Walker*, 35 Cal. 634.

The Mayor and Common Council of San Jose vs. *Trimble*, Supreme Court of California, October Term, 1870.

In *Leffingwell* vs. *Warren*, 2 Black., 606, this Court say:

"Statutes of limitations are now regarded more favorably in all Courts of Justice. *They are Statutes of Repose.*"

The plaintiff not having shown any title to the demanded premises derived from Spain or Mexico, no question can arise as to whether the statute of limitations of the State of California is void as in violation of treaty rights. Nor could the question arise in the present case even if the plaintiff had shown such right. When the United States have acted upon such right and clothed the party with a legal title and State legislation attempts to refuse effect to such title, then it will be time enough to consider the power of the State to do so. Of the power of the State to prescribe a limitation to the commencement of an action upon an inchoate title derived from Spain or Mexico there can be no doubt, notwithstanding the treaty, and there is

equally as little doubt that the State Legislature may prescribe a limitation as to actions upon such title after the same has been recognized and patented by the United States, allowing the parties a reasonable time thereafter within which to sue for the recovery thereof. But for the reason stated the question does not arise in the case at bar. There is no pretense of any recognition of or patent received upon the title of plaintiff from the United States. The alleged grant upon which the plaintiff relies was made January 12th, 1850, and this action was only commenced on April 14th, 1868, some eighteen years afterwards. The plaintiff has had abundant time within which to prosecute his action, and therefore has no cause to complain.

The judgment of the Circuit Court was correct, and should be affirmed.

All of which is respectfully submitted.

HALL McALLISTER,
Counsel for Defendants in Error.

Opinion of Justice Hoffman in the suit of Peter Sherrebeck vs. The United States.

The claim in this case is for 800 varas of land on Rincon Point, in this city, alleged to have been granted to the claimants by Manuel Castro, Prefect of the Second District of California.

It was rejected by the Board for want of evidence that the land was part of the common lands of the Pueblo of Yerba Buena.

The same tribunal, in the subsequent case of the City of San Francisco *vs.* The United States, confirmed the claim of the city to certain lands within boundaries mentioned in their decree.

In this decision the United States have acquiesced by dismissing the appeal that had been taken to this Court.

It is not disputed that the land claimed in this case is within the demarcation of the Pueblo of Yerba Buena, as ascertained by the decision in question.

But, as that case was between other parties, the point cannot be considered as *res adjudicata* in this. Nor can the evidence on which that decision was based be regarded, for it has not been, by stipulation or otherwise, introduced in this cause.

The case now before the Court must be determined on the evidence contained in the record alone.

No additional testimony has been taken in this Court by either party.

No argument has been made or brief filed on the part of the United States. And the case is submitted without the statement of any objection to its validity, except that contained in the brief opinion of the Board, and which relates solely to the defect of proof on a point which has since been thoroughly investigated and determined.

It is to be regretted that in a case of so great importance, the Court is left to determine questions of law without argument from both sides; and to decide questions of fact, which it would seem could be ascertained with entire certainty, merely by a preponderance of testimony.

The cause was submitted to the Court on the 28th of August, 1857, on briefs to be filed.

The claimants have frequently called the attention of the Court to the case, and they have a right to insist that a decision be rendered. I therefore proceed to decide it on the evidence before me.

The claimant has produced the grant made to him by the Prefect, and an *expediente* containing the petition of Sherrebeck, dated November 24th, 1845; the marginal order of reference of the Prefect and the *informe* of the local authority. Also a letter signed "Pedorena," addressed to the Prefect, and enclosing a sketch and giving other in-

formation as to the place which Sherrebeck was soliciting. This letter is dated November 20th, 1845; and the reply of the Prefect, dated November 21st, addressed to Sherrebeck, is also produced; in which he tells him that he can make his petition in conformity with this letter and diseño, as he, the Prefect, could not properly draw up the petition, as requested by Pedorena.

The petition seems accordingly to have been drawn up three days afterwards, and the grant issued on the 5th of December of the same year.

The genuineness of the signatures to all these documents is proved by the testimony of the Prefect himself, and other witnesses. It does not appear from the transcript of the evidence before the Board, that any attempt to impeach their authenticity was made by the United States, nor is any doubt on the subject anywhere suggested. The title papers must therefore be considered as genuine.

Assuming them to be so, two questions are presented:

1. Had the Prefect authority to grant the common lands of a Pueblo?

2. Were these lands a part of the common lands of the Pueblo of Yerba Buena?

The power of the Prefect to grant the common lands of the towns, is claimed to be derived from the seventy-seventh article of the organic law of 1837.

This article is as follows: "They (the Prefects) shall regulate (arreglaran) executively (guberna-

tivamente) and conformably to the laws, the distribution (repartimiento) of the common lands (Tierras comunes) in the towns (Pueblos) of the district whenever there is no litigation pending in the tribunals respecting them, reserving to the parties their rights of appeal to the Governor, who, without further recourse, will decide the matter as may be proper, with the concurrence of the Departmental Junta."

In the case of Manuel Larios *vs.* The United States, the construction of this article was considered by the Board of Commissioners, and it was decided that it conferred upon the Prefects the power of granting the common lands.

In the opinion delivered by Mr. Commissioner Thompson, the objections to this construction and the reasons for adopting it are stated with his usual force and perspicuity.

It was contended that the authority to "regulate" ("arreglar") did not import an authority to grant, but merely a right to prescribe rules by which the distribution should be governed. This objection Mr. Commissioner Thompson admits would undoubtedly be correct if the word stood alone in the sentence, but he considers that the context indicates that the word was used in its technical sense; "and that it means to adjust the administration of provinces—to enact laws for them." The subject which the Prefect is empowered to regulate (arreglar) is the distribution (repartimiento) of the common lands, which (he observes) is the word generally used to signify the

granting of such lands. The Prefect is further empowered to regulate this distribution *executively (gubernativamente.)*

It appears from the provisions of the organic law of March, 1830, that almost the same powers, functions and duties were attributed to the Governors, and the Prefects within their respective spheres. And the latter officers seem to have possessed within their districts, and over the matters committed to them, an authority nearly identical with that of the Governor, within his own department. They were, of course, subordinate to and under the control of the Governor, but the nature of their positions were similar.

When, therefore, the power to regulate the distribution of lands in the towns "gubernatively" is given to the Prefect, it may be justly, etc., presumed that it was intended to confer on him the same authority with regard to those lands which the governor exercised over the department at large.

It was for these reasons that the Board adopted the construction of the article which has been mentioned. I am much impressed with their force. They do not seem to me, however, to be entirely conclusive.

It will be observed that the power of the Prefects to regulate the distribution of lands is limited to cases "where there is no litigation pending in the tribunals respecting them." This limitation or exception would seem to indicate rather an authority to settle disputes, etc., between the *vecinos* of the Pueblo as to their occupation than a power to grant them in property.

To enable the inhabitants of a Pueblo to avail themselves of the *egidos* or common lands of the Pueblo in any other way than by pasturing cattle upon them in common, and procuring wood, etc., from them, it would obviously be necessary that an allotment of portions of them for the temporary but exclusive use of individuals, should be made for purposes of cultivation ; unless such a distribution were made it is not to be supposed that the necessary labor would be undergone by a few for the benefit of all. It was necessary, then, for to secure to him who sowed, the right of reaping, and in this way various allotments would be made, and lands distributed among the vecinos.

It may therefore have been intended by the law to give to the Prefects the power of regulating this distribution, and for this purpose the exception of cases pending before the tribunal is natural and proper.

The succeeding clause reserves to the *parties* their right of appeal to the Governor; etc.

It will be noticed that this right is not reserved to the "party interested," the usual phrase applied to a person soliciting a grant, but to the "parties," indicating, it would seem, two disputants: and the right reserved is not the right of presenting a petition for land to the Governor, but the right of "appeal" to him, seeming to indicate that the matter appealed from was to be a quasi judicial determination.

On this appeal the law directs that the Governor "shall decide the matter as may be proper with

the concurrence of the department, Al Junta." The law does not direct him "to accede or not to the petition or to determine upon the solicitation," or use with regard to his action the phraseology generally employed with reference to an application for a grant, but it directs him to "*decide the matter* with the concurrence of the Junta," thus again seeming to indicate a proceeding like an appeal to the King in Council for the determination of a dispute rather than an application for a gratuitous concession of land.

If then, this were a solitary instance of the assumption of the granting power by a Prefect, I should be inclined to hold, notwithstanding my great respect for the opinion of the Board on the subject, that the law of 1837 did not confer the power claimed.

But it appears that the authority in question has been exercised by the Prefects on various occasions —nor have the rights attempted to be conferred by them, ever, so far as we can ascertain, been disputed. They appear to have been generally acquiesced in by adjoining proprietors, and even expressly recognized by the Departmental authorities.

In the absence of any judicial decisions, which determine the construction and effect of a foreign law, the practical interpretation given to it by those whose duty it was to apply and administer it affords the best means of ascertaining its true meaning. Unless, therefore, it be clear that the officers charged with its administration, have misconstrued it, a foreign Court, with necessarily an

imperfect acquaintance with the subject, ought to be slow to substitute its own construction of the law for that of the Government which established it, or to declare that powers frequently exercised and generally acquiesced in, were usurped. No objection on this point has been made by the U. S.—and in the face of the opinion of the Board, and the practice of the former Government, I do not feel that certainty that the construction I incline to adopt is the correct one, which would justify me in deciding that the Prefect was mistaken as to the nature and extent of his powers.

2d. The evidence that the land granted in this case was part of the common lands of Yerba Buena, is contained in the two depositions of Castro, the Prefect, and in the expediente.

Manuel Castro swears that the lands granted by him to Sherrebeck, as also those granted to Presentacion Miranda de Ridley, were within the demarcation of Yerba Buena—that he was informed that the limits of Yerba Buena to the south was a line drawn from the point to the south of Rincon Point across the estero and cienega or swamp, in a westerly direction to the Mission Road—that all the citizens recognized the lands lying to the north of this line as belonging to Yerba Buena. That the Judges reported to the same effect, and the line was established by custom.

By the expediente it appears that the petition of Sherrebeck was referred to the "chief local autority" of Yerba Buena for the usual "informe." This official reported that "in the opinion of this

Juzgado only land upon which to build a house and corral, and to plant, should be granted to him. The Prefect accordingly grants him el Rincon *embraced within the demarcation* of Yerba Buena to the extent of 800 varas square, and subjected him to the payment of the tax which might be assessed to him by the Most Excellent Departmental Assembly.

In the grant the Prefect recites that it is made in virtue of the powers vested in him by the law of the 25th of March, 1837, the provisions of which have been considered in a former part of this opinion.

The provisions of that law give, as we have seen, authority to the Prefect to regulate the distribution of the common lands of the Pueblos, and the reference to it in the grant and the mention of the land granted as "within the demarcation of Yerba Buena," afford in the absence of opposing testimony, presumptive proof that the land was so situated, and that the officer acted within the limits of his authority.

In the case of the *U. S.* vs. *Reading*, the Supreme Court held the recital in the grant, that the grantee was a citizen by naturalization, to be satisfactory evidence of the fact; so in this case, the recital that the land is within the demarcation of Yerba Buena, and a reference to a law-giving power to the Prefect to regulate the distribution of the common lands of Pueblos as the source of his authority, to make the grant in question, ought to be received as evidence of the fact. Castro himself

testifies to the same effect, and states positively that the land granted to Sherrebeck was within the demarcation of Yerba Buena. Upon the whole, I think, that without referring to the evidence of the decision of the case of the *City of San Francisco* vs. *The United States*, and looking alone to the evidence in this record, I am compelled to presume that the land granted was within the limits of the Pueblo of Yerba Buena.

With respect to the occupation and cultivation of the land, there is some conflict of testimony on the part of the United States, two witnesses have testified that they never saw any occupation or cultivation on the part of the claimant. Several witnesses testified that a house was built, and a considerable part of the land cultivated in 1845 or 1846.

Obliged as I am to decide the case upon the evidence submitted, I have no alternative but to determine that the preponderance of testimony is on the side of the claimant.

If the fact be otherwise than as testified to by them, it would have been easy for the United States to have established it.

The condition of Rincon Point, and the non-existence of a house with a considerable cultivation around it on that Point, at so recent a period as the years 1845 and 1846, could have been shown, it would seem beyond all room for doubt.

But as before observed, no testimony whatsoever has been taken by the United States since January, 1856, when the transcript was filed in this Court.

No objection to the claim, for *want* of occupation and cultivation, is noticed in the opinion of the Board, nor is any objection whatsoever to its validity taken by the United States in this Court.

Under the evidence before me I do not feel warranted to declare that the claim in this case has been forfeited by abandonment.

With respect to the location of the land, the testimony shows that in 1846 the Alcalde of Yerba Buena pointed out to Sherrebeck, on the place called el Rincon, the boundaries of the tract. He directed him to measure four hundred varas in four different ways, from an oak tree in the centre of the land—and the situation of which is identified by the witnesses. It was at the foot or near this oak tree, that, as testified by the witnesses, the house of Sherrebeck was placed. Sanchez testifies that when he pointed out this tree, as the place from which to begin the measurement, there was a brush house there; and that afterwards Sherrebeck built a log house, into which he was putting the windows when the witness was on the Point in 1846.

There can be no doubt then, for if this testimony is to be believed as to the precise location of the eight hundred varas granted to Sherrebeck, or rather of the land which he was authorized to occupy, and did occupy, and cultivate under his grant.

Since the above was written, the testimony in the case of The City of San Francisco *vs.* The United States, has been filed, by consent, in this

cause. I do not understand it to be disputed that that testimony establishes the existence of the Pueblo of San Francisco at the date of the grant in this case, or that the land granted was within the demarcation of the Pueblo.

[ENDORSED.] Filed December 5th, 1859.
W. H. CHEEVERS, *Clerk.*

I, Edward B. Cotter, Clerk of the District Court of the United States for the District of California, do hereby certify the foregoing to be a full, true and correct copy of the opinion of Justice Hoffman in the suit of Peter Sherrebeck *vs.* The United States.

Attest my hand and the seal of said District Court, this 30 day of March, A. D. 1871.

EDW. B. COTTER, *Clerk.*

By A. D. GRIMWOOD, *Deputy Clerk.*

[SEAL.]

Gen. Halleck's Notes upon the Case of Hart vs. Burnett et al., 15 California, page 576.

NOTE 25.

Great errors have been sometimes committed by the Courts, respecting land titles in California, not only by applying laws which relate to one class of pueblo lands to a class entirely different in its character, as alluded to in this opinion of the Court, on page ——, but also in determining the validity of Mexican titles by old Spanish laws, which have not the slightest application to the agrarian system adopted in New Spain soon after the conquest, and continued in force after Mexico became an independent sovereignty. For example, the old laws relating to municipal *fueros*, alluded to in a preceding Note, have no more relation to land titles in Mexico than to land titles in Massachusetts.

It would be as difficult to fully understand the titles by which land is, or has been, held in England, without going back to the history of the origin of these titles, of which we have an account in Book 2, Chapter V, of Blackstone's Commentaries, as it is to understand the exact nature of land titles in Mexico, without reference to the agrarian system of the Indians, upon which the old Spanish system was engrafted, and by which it was modified and changed in many essential particulars. This is more particularly true with respect to lands within the limits of cities, pueblos and vil-

lages. Without some knowledge of the ancient Mexican laws relating to lands, it is utterly impossible to understand the purport of many laws found in the *Recopilacion de Indias* respecting *pueblos, poblaciones, reducciones*, etc. The limits of these Notes will admit but a brief allusion to this subject.

At the time of the conquest of Mexico by the Spaniards, that country was divided into three independent monarchies, each monarchy being subdivided into separate lordships, afterwards called *cacicazgos*, and the lands of each *cacicazgo* was divided into six different classes :

1st. Lands assigned for the support of religious worship, which were cultivated by the Indians *en comun*, under the directions of the priests, who also had entire control of the products.

2d. Lands assigned for the support of the government or administration. These were not grantable, but went with the lordship, or what the Spaniards called the *senorio ;* they were called *Tlatacamilli.*

3d. Lands called *Tecpantlalli*, the income from which was devoted to the support of the *cacique*, but could not be alienated by him.

4th. This class of lands was considered as the patrimony of the *caciques*, and was granted by them to the subaltern chiefs called *Tecallec*, who could transfer them to each other, but could not alienate them to individuals of the common class, called *Macehualli.*

5th. Lands called *Pil-lalli*, which were rented or contracted out by the owners to the lower classes, for cultivation and other purposes.

6th. Lands called *Altepe-tlalli*, which were held by certain families or communities, forming a kind of parish, town or municipality, called *calpulli.* The lands of each *calpulli* were divided up into lots, and assigned to individuals for cultivation and other uses. There were six classes of such assignments, according to the

objects and purposes of their use. The last of these classes was the assignment of lots to individuals for their own use, each one being considered the owner of the lot which was so assigned to him. He could transmit to his heirs, or exchange it for any other lot in the same *calpulli*, but he could not sell it, and his title was forfeited if he abandoned it for the term of two years. This class of lands was subsequently denominated by the Spaniards, *tierras de comunidad*, or *tierras de Parcialidades*, and sometimes *tierras comunes*.

Such is a brief summary of the land laws of Mexico, at the time of the conquest by the Spaniards. The latter were disposed to pay very little regard to the rights of the conquered, whether of community or of individuals. But the king soon came to the rescue of his new subjects, and issued various orders and decrees for the protection of their rights of property. Of this class are the *Ordinanzas de Poblaciones*, and other *Pragmaticas* and *cedulas*, afterwards embodied in the *Recopilacione de Indias*.

But while seeking to protect the rights of the Indians, it was necessary to provide also for the settlement of the country by the Spaniards, and to reward the early conquerors by grants of land. Of course the conquest had conferred upon the new sovereign all the rights of the ancient Mexican monarchs, and all lands not held by individuals or communities were deemed susceptible of grant by the crown. In order to reward individuals who had engaged in the conquest, or to confer favors upon others whom the king wished to benefit, large tracts were granted in private ownership, care being taken in making these grants not to interfere with the individual or community rights of the natives.

Again, to carry out the general policy of settling the conquered country described in Note 10, dispositions were made for establishing *towns*, in which the Spaniards, whether holding rural grants or not, were to be

collected for mutual security aud defense. These towns were usually denominated *Pueblos de Espanoles.*

And again, another part of the general plan of civilizing the Indians was to collect together those who, driven by the conquerors from their ancient homes and means of subsistence, had taken refuge in the woods and mountains, and were forced to resort to predatory incursions upon the new settlements in order to obtain the means of sustaining their precarious existence. These Indian settlements were called *Pueblos de Indios,* or simply *Poblaciones.*

Hence the two different systems of *pueblos* referred to in the laws of the Indies—systems totally distinct in their nature and character, and well understood by Spanish and Mexican legislators and lawyers, but too often confounded, and too generally misunderstood, by our own Courts.

In carrying out both of these systems of town settlements, great care was taken that no intrusion should be made upon the existing rights of the Indians, whether individuals or communities. Hence it was especially ordered that, in establishing new towns, they must be founded in *vacant lands,* "sin perjucio de los Indios y naturales, o sin su libre consentimiento." Vide Recopilacion de Indios, Lib. 4, Tit. VII, leys 1 and 23; Lib. 6, Tit. 3, ley 9, etc.

Having described the two classes of towns which were recognized in the Hispano-Mexican system of settlement, viz: *Pueblos de Indios* and *Pueblos de Espanoles,* we will now refer to the various classes of land recognized by that new system of jurisprudence, including those within, as well as outside, of the town limits.

Lands, as a general rule, were classed as *realengas, concejiles, de comunidad, de Indios* and *de dominio particular.*

Realengas were lands of the king—that is, lands of the crown or royal patrimony; *concejiles* were lands which belonged to towns, and were subdivided into

classes according to the character of such towns and the purposes for which they will be used; *tierras de comunidad* were the lands granted to, or considered as belonging to the *Reducciones* or *Pueblos de Indios; tierras de Indios* were those granted to Indians, and *tierras de dominio particular* were those which had been granted in individual ownership.

Each *Pueblo de Espanoles* was entitled to have for its administration a municipal organization or corporation, called an *Ayuntamiento*, which exercised a certain authority over the territory included within the limits of such pueblo. The land included within such limits was called *concejile*, and was usually divided into three different classes, as stated in the opinion of the Court, viz: *Ejidos*, which were lands for the common use of all the inhabitants, as streets, public squares, etc.; *Propios*, or lands, the products of which were for defraying the expenses of the municipal administration. "These," says Ramirez, "were *de dominio comun, pero no publico.*" And lastly, the great body of the *tierras concejiles*, which were intended for division and assignment to the *pobladores* or *vecinos*, in lots called *solares* and *suertes*, and which, when so assigned or granted, become of private ownership, *de dominio particular*. There were other subdivisions, which it is unnecessary to mention in this place. They are briefly referred to in the opinion and in Note 10.

These *Pueblos* de *Espanoles* were established under the orders of the Viceroys, and Presidents, and Governors of Provinces, and their boundaries were such as had been given by the general laws, or had been assigned by these officers, or by the municipal authorities themselves, and the expedientes of such demarcation submitted to such officers for confirmation, subject of course, as were all such acts, to the approval or disapproval of the king. The assignment, distribution or grant of the lots—*solares* and *suertes*—in such pueblos

was made by the *Ayuntamientos*, in conformity with the custom which had prevailed in Spanish towns, where no special charters or *fueros* had been granted to the lords who ruled over them. Perhaps there was at first no positive direct written authority for this, but it was exercised for so long a time that the usage acquired the force of law. But the abuse of this power finally called for remedial measures, and various orders and decrees were issued restricting its exercise. It was found that influential persons had contrived to obtain from Ayuntamientos large tracts of ungranted lands in pueblos, which they reduced to *tierras de labor*, thus depriving other *vecinos* of their just rights and preventing the increase of population, as there were no lands to be granted in *solares* and *suertes* to new *pobladores* who might wish to establish themselves in such towns. This abuse induced the king, in 1618, to declare the *Ley de Toledo*, first enacted in 1480, to be in force in America *(vigente para America)*. Vide Recopilacion de Indios, lib. 4, tit. 12, ley 21; Nueva Recop. lib. 7, tit. 7, ley 3; Novis. Recop. lib. 7, tit. 21, ley 5. This law provides for the restoration of *tierras concejiles* which had been appropriated to themselves by individuals, or had been granted to them without proper authority, and contrary to the object for which they had been assigned to such towns. Other laws, orders and decrees were subsequently issued for the same purpose.

In order to understand these laws and orders, it is necessary to know the circumstances under which they were issued and the object they were designed to accomplish. They were not intended to *confer powers*, but to restrict powers which already existed, or which at least had been long exercised with the tacit consent of the crown and royal officers.

Again, it sometimes happened that in organizing these pueblos, no lands were assigned for *ejidos*, *dehesas* and *propios*, and that the want of such lands was sub-

sequently felt by the citizens and municipal authorities to be of serious inconvenience; consequently, special laws were issued, positively requiring that such assignment or designation be made.

And again, it not unfrequently happened that designing persons procured, by a misrepresentation or concealment of the facts, from the Viceroys, or direct from the crown, special grants of lands within the limits of pueblos already organized, against their consent and contrary to the interests of said towns and to the objects of their formation. To remedy these abuses, orders were issued declaring such grants to be null and void.

Without attempting to refer to all the laws upon this subject, we will merely designate a few which will tend to confirm much that we have here said.

Law 13, Title VII, Book IV, Recopilacion de Indias, directs that commons *(ejidos)* be designated for each town.

Law 14 directs that *dehesas* be designated next to the *ejidos* for common pasturage, etc., and also *propios*.

Law 1, Title XII, of same book, says: "It is our will that there be divided up and distributed houses, *solares*, lands, *caballerias* and *peonias*, to all those who shall settle *(pablor)* new lands in the pueblos and villages," etc. At the end of four years, the lands so distributed to persons living in the pueblos were to be considered as in full ownership, and thereafter to be freely sold and transferred.

Laws 4, 5 and 8 provide that Viceroys may, by advice of the councils of cities and towns, grant lots and lands in such towns to *pobladores*, but that the petitions for such grants must be made to such town councils, who are to report thereon to the Viceroy or President and Deputies.

Law 1, Title XVI, Book VII, of the *Novisima Recopilacion*, says: "Our will and pleasure is that our cities,

towns and villages preserve their rights, rents and *propios*, and that no gift be made of anything of them; wherefore, we command that all gifts of them, or of any part of them, which we may make to any person, be of no value." The gifts here referred to are evidently such as are contrary to the object of the original dedication or assignment to cities, towns and villages; for not only the king, but also the Viceroys, Presidents, Governors, Deputies, councils and contractors, were authorized to grant and distribute *solares* and sowing grounds to the *pobladores* and *vecinos* of towns. The very next law so explains it, for the king there orders property and lands, pertaining to towns given away by him or his ancestors—that is, given contrary to the object of their original assignment—to be restored. *Solares* and sowing grounds, as *caballerias* and *peonias*, given to the settlers, and which, by the laws, become in four years theirs in full ownership with right of disposition, were not of course to be restored.

With this brief notice of the *Pueblos de Espanoles*, let us now turn to those municipal establishments called *Pueblos de Indios*. The organization of the municipal administration of the latter did not differ very essentially from that of the former, but the rules which governed the disposition and regulated the tenure of lands within their limits were entirely dissimilar.

These *Pueblos de Indios* mostly originated in those regulations or *providencias* which were issued immediately subsequent to the conquest for the direction of the operations carried on, under royal auspices, for the Christianization and civilization of the natives, known and designated in the laws as *reducciones*. Only a very limited quantity of lands were usually assigned to such pueblos. This, at one period, was limited to twelve hundred varas in every direction, and subsequently was extended to one square league, and in some special cases a still larger tract was allowed.

The lands assigned to such *Pueblos de Indios* partook somewhat of the legal character of the *ejidos* of the other class of pueblos, and were sometimes so denominated in the laws. No part was set aside as *propios*, nor were any *solares* and *suertes* granted to individuals in full ownership. Those assigned to individuals for cultivation, etc., were called *tierras de comunidad*, and in their legal character were closely assimilated to the ancient *calpulli*, already described. The title of the Indians to the lands of the pueblo was regarded as in full property, but *pro indiviso*, and no individual could alienate the part which might be assigned to him for his use. Portions of this land were assigned to individuals and families, for their separate use, while other portions were cultivated in common, for the common benefit. The latter were sometimes called *comunales*, and sometimes *tierras comunes*, the latter term being also applied to the *tierras de comunidad*, or general body of land within the limits of such *Pueblo de Indios*.

It may be proper to remark that Spaniards were sometimes permitted to settle in the *Pueblos de Indios*, but they could acquire no other title to the lands which they might occupy or cultivate than that which was accorded to the Indians in like cases.

It was to these *Pueblos de Indios*, and their lands, called *comunales*, *de comunidad* and *tierras comunes*, that many of the laws and ordinances were specially and exclusively directed, and not to the lands of pueblos established by Spaniards. Of this character are the ordinances of February 23, 1781, found in chapter twelve of the *Ordinanzas de Tierras y Aguas;* Article thirty-three of the *Ordinanzas de Intendentes;* the decree of the *Consejo de Regencia* of May 26, 1810; the decree of the *Cortez*, March 13, 1811; that of November 9, 1812; and many subsequent decrees and orders, as well as very many of the laws found in the *Recopilacion de Indias*, especially all those relating to *reducciones* and *pobla-*

ciones. But the law of January 4, 1813, according to commentators, refers exclusively to *Pueblos de Espanoles*. This is manifested by the terms used, as *propios*, which class of lands were unknown in Indian pueblos. But the decrees of April 15, 1820, and November 24, 1824, refer to the community lands of Indian towns; vide the decree and regulations respecting the *Parcialidades de San Juan y Santiago*. And it is to this same class of lands that Article seventy-seven of the law of March 20, 1837, refers. The *tierras comunes* mentioned in that article are neither the *tierras concejiles*, nor the *ejidos* of pueblos of Spaniards, or *gente de razon*, but the *tierras comunes*, or *de communidad*, of the Indian pueblos, which were held by a tenure entirely different from the other classes of pueblo lands. This is the construction always put upon it by jurisconsults in Mexico, and we think it is obvious from the terms of the law itself. But this matter will be considered in the next Note.

We have deemed it necessary to give this sketch of the different kinds of pueblos and their lands, even at the risk of repeating what has been said in other Notes, because the distinction is not clearly pointed out in the opinion of the Court, and consequently some of the references there made to laws might mislead the reader without this explanation.

NOTE 26.

POWER OF PREFECTS TO GRANT PUEBLO LANDS.

Although the Supreme Court declines to express any opinion with respect to the power of a Prefect to grant pueblo lands in individual ownership, yet it distinctly asserts "that such power is not expressly given by the Act of March 20, 1837."

As this is the only law referred to by Judge Hoffman in his decision confirming a Prefect grant, in the claim of Sherback, it follows that the opinion of the Supreme Court of this State, with respect to the meaning and effect of that law, is directly in conflict with that of the United States District Judge. Which of these opinions is correct?

We have discussed, in the preceding Note, the two kinds of pueblos recognized in Mexican law, and the division or classification of the lands of each We have also shown that the seventy-seventh Article of the law of March 20th, 1837, refers exclusively to *Pueblos de Indios*, and not *Pueblos de Espanoles;* that the *ejidos* and *dehesas* of the latter were of *dominio publico*, and that the *propios* were of *dominio comun*, but not *publico;* while the lands of the former, called *de comunidad*, and sometimes *tierras comunes*, were almost precisely of the nature of the ancient *calpulli*, and were held *pro indiviso;* and that neither of the foregoing classes were grantable in special ownership, without special license, from the crown, or supreme authority; in fine, that the authority to dispose of those particular classes of lands was not included in the ordinary powers of Ayuntamientos and Alcaldes to grant *tierras concejiles* in private ownership.

Moreover, it is also shown in the opinion, that by Article eight of the same law, the Prefects were to report to the Governor with respect to the necessity or public convenience of allowing Ayuntamientos to alienate pueblo lands; and that Article nine authorizes the Governors of Departments to grant such permission, on the previous consent of the *Junta*, specifying at the same time, that any cession, donation or contract, made without such license, should be null and void (*nulo y de ninguna valor*). Would it not be a very strange thing if a subsequent Article of that same law conferred upon the Prefect a power which the Governor himself could

not exercise, except in subordination to the will of the *Junta?*

In order to fully understand this Article we will copy, in full, both the original and the translation:

"ART. 77. Arreglaran gobernativamente y conforme a las leyes el repartimiento de tierras comunes en los Pueblos del distrito, siempre que sobre ellas no haya litigio pendiente en los tribunales, quedando a los interestados su derecho a salvo para ocurrir al gobernador, quien sin ulterior recurso decidira lo mas conveniente, de acuerdo con la junta departmental."

[TRANSLATION.]

"They (the Prefects) will regulate, executively and conformably to the laws, the distribution of *tierras comunes* in the pueblos of the district, provided there be no litigation respecting them pending in the tribunals; reserving to the parties interested their right to appeal to the Governor, who, without further appeal, will, in concurrence with the Departmental *Junta*, decide what is most proper."

Let us examine this Article critically: "They will regulate" (*arreglaran*); that is, they will prescribe rules. Chief Justice Marshall, in commenting upon the clause of the Constitution which empowers Congress to "regulate commerce," says, "the power to *regulate*, that is, to prescribe the rule by which commerce is to be governed." Gibbons *vs.* Ogden, 9 Wheat. Rep., p. 196. But the power to *regulate* is very different from the power to *make*. Will any one contend that because Congress may *regulate commerce*, it may also itself engage in trade, or monopolize it?

Again: "They will regulate executively (*gobernativamente*) and conformably to the laws, the distribution of common lands in the pueblos (*el repartimiento de tierras comunes en los pueblos*) of the district." They, are,

therefore, "to prescribe the rule by which this *repartimiento* is to be governed." They are not to make it themselves; but they are to prescribe the rule by which it is to be made by others. Aud in what manner are they to prescribe this rule? As legislators who make laws? Not at all. They are merely to act in an *executive* capacity, and must, in this matter, conform to the laws which the general Congress or Departmental *Junta* may enact. They have no other powers than such as the laws had, at that time, or might thereafter confer upon them. If no power had been, or should thereafter be conferred upon any one to make a *repartimiento*, there would be no one for whom the Prefects were to "prescribe rules." They had no legislative power to authorize any *repartimiento*. *Repartir*, according to the dictionaries, means to divide, to distribute, to apportion, to assess, to levy a tax. But what was the subject of this division, distribution, apportionment, assessment or taxation? Common lands (*tierras comunes*). What common lands? The lands which were enjoyed by all the inhabitants of the district? Not at all. Only the common lands *in the pueblos;* that is, within the limits of, or appertaining to, *pueblos* in their district. We have already shown that a district, or even a *partido*, might, and often did contain a number of pueblos, each separated from the other by a great distance. The lands, then, which were the subject of this *repartimiento*, were simply those which had been devoted or assigned to the pueblos, and were included in their respective boundaries.

But the question here arises, of what kind of pueblos? We have already shown that the Spanish and Mexican law recognized two classes of pueblos, essentially different in their character, and in their rights to the lands within their limits. And again: what are the lands here referred to, and called *tierras comunes?*

The pueblos here mentioned are, in our opinion, unquestionably *pueblos de Indios*, and *tierras comunes* are

the lands of such municipal establishments known in the ancient laws as *calpulli*, and in modern Mexican jurisprudence as *parcialidades*, *tierras de comunidad*, and *tierras comunes de Indios*.

This article of the law of 1837 has been critically examined by a learned Mexican jurisconsult, the Licenciado Jose Z. Ramirez. We quote as follows from his remarks. In commenting upon this Article, he says:

"1st. What were the lands which are denominated *comunes?*

"2d. In what proportion are they to be distributed (*debian repartirse*)?"

In answer to the first question he says:

"Unquestionably this cannot refer to *tierras concejiles o del comun* of towns, because only that common thing is *partible*, the dominion or property of which pertains to a certain and determinate number of persons who possess it *pro indiviso*. None of these qualities are found in *tierras concejiles;* nor in *ejidos* or *dehesas*, because our civil law declares them to be of *dominio publico*, and not for the use or enjoyment of any particular class or certain number of persons, but for all the residents of the towns, without distinction of classes or persons. (Part. 3, Tit. 28, ley 9.) Nor are these qualities found in the lands called *Propios*, because, even when they remain common, individuals cannot exercise over them any right of dominion or possession for their exclusive enjoyment, as is also declared by our civil law. (Lei 10 Cod.) The Mexican municipal authority is only that of an administrator who has the care and government of these lands in the name of the Pueblo, employing their products and rents for the benefit of the *poblacion*. I conclude from what is before stated that the *tierras comunes*, which Art. 77 of the *Reglamiento* of March 20th orders to be divided, are not *tierras concejiles*, for they were not *partible*.

From this conclusion it is also deducible that those referred to are the *tierras comunes de los Indios*, known in common and legal language under the name of *tierras de comunidad*."

The second question, Ramirez says, is answered by the terms of the law itself ; that is, the division is to be made "conformably to the laws," (*conforme e las leyes*). He then proceeds to examine what were the laws in force at that time respecting the dividing up of the community lands of Indian Pueblos, and says, that according to the federal constitution of 1824, the disposition of such matters in the States belonged to the States respectively, while in the Federal District and the Territories it pertained to the Federal Government; consequently, in the Departments formed out of States, we must look for this matter in the laws and dispositions of the State governments, and in those formed out of Territories we must look in the Acts of Congress of the Federal Executive, and the consequent acts of the Territorial governments.

The Department of the Californias was formed out of the Territories of Upper and Lower Californias. In examining the decrees of the Spanish Government and the Acts of the Federal Congress, prior to 1837, we find nothing to authorize the distribution of the community lands of Indian Pueblos in these Territories. The Act of November 27th, 1824, refers only to the *Parcialidades* of San Juan and Santiago, and the distribution of even these community lands ceased under the regulation of September 20th, 1835, which forbid any further *repartimientos* without the further action of Congress, (*sin que primero lo resolviera el Congreso General*). As Congress never did pass any subsequent law on this subject, either before or after the 20th of March, 1837, Ramirez concludes that Article 77 of the law of that date was wholly inoperative in the Federal District and in Departments formed out of Territories.

But let us suppose that the construction put upon this Article by Mexican lawyers is incorrect, and that it refers to *Pueblos de Espanoles* as well as Indian Pueblos. The same question arises: what *tierras comunes* of such pueblos were subject to distribution, and in what manner did the laws permit them to be distributed?

We have already shown that the only lands of such pueblos in Mexico; to which the name *comunes* could possible apply were the *propios, ejidos* and *dehesas*. The former could be rented out for the benefit and support of the administration of the pueblo, but they could not be reduced to individual ownerships. The latter were, in no legal sense of the word, distributable, for they were not only *common* but also *public*, and the *public* use of these lands was under the direction of the municipal authorities. Thus the Ayuntamiento took care of the roads, parks, recreation grounds, threshing and watering places, and the public woods and pastures. With respect to the latter, they determined how many cattle each *vecino* could put in the common *pastos*, and how much firewood each one might cut in the common *montes*. In this sense, these lands might be considered *distributable*, although the word *repartir* would scarcely be applied to such regulation or apportionment of their use. If such be the *repartimiento* referred to in the law of 1837, it gave the Prefect power to form regulations by which the Ayuntamientos were to be governed in their apportionment or distribution of this use of the commons of pueblos. And this is the full extent of the powers conferred upon Prefects by that law over the lands of *Pueblos de Espanoles*, even supposing it to refer to such pueblos.

To apply this Article to the general lands of a pueblo, not assigned for special purposes, as *ejidos* and *propios*, would be diverting it from its object, for, according to its terms, its only object is *tierras comunes;* but the general lands of a pueblo are, in no sense of the term,

comunes. Moreover, the laws confided the disposition of such lands to the Ayuntamientos and Alcaldes, under such authority as might be given to them by the Governors and Deputations. Here, then, was a direct conflict of powers; a limited authority to grant, in the Governors and Ayuntamientos, and an unlimited authority to grant the same thing in the Prefect! As the latter was not a municipal officer, how were the Ayuntamientos to know what lands were granted by the Prefects, and what were left for disposition by them?

How incongruous and conflicting are the Spanish and Mexican laws made to appear by such interpretations; whereas, by a proper and reasonable construction, they are found to form as complete and as well adjusted a system as that of any other civilized people. Indeed, the Spanish civil code has always been held in high estimation by the ablest jurisconsults of the world.

But it is said that the authorities of California construed that law as authorizing Prefects to grant lands belonging to all kinds of pueblos. We are of the opinion that the Archives prove that such authority was never claimed or exercised by the Prefects themselves. Of the eight hundred and odd claims presented to the Board of Land Commissioners, only four grants purport to be signed by Prefects. Not one of these is recorded or noted in the Archives, or is preceded by the ordinary expediente; not one is in the usual form of California grants, or is made upon the kind of paper used for such purposes at the time they bear date; and only one of these was confirmed by the Commissianers, and that purports to be made by the Governor, and to be signed and issued by the Prefect *under the Governor's orders*. Admitting the papers in that case to be genuine, and not simulated, they are no proof that the Prefect himself claimed or exercised the power to grant land. The second grant purports to be made by the same Prefect; but it was rejected by the Commission,

and we think an examination of the original papers will convince any one acquainted with genuine California grants, that it ought to have been rejected. Its further prosecution was abandoned. The third one was also rejected by the Board. It does not even purport to be a grant in ownership, but is merely a permission to cultivate a tract of land not within twenty miles of any pueblo! The fourth, and only remaining case, is the celebrated Sherbeck claim for some two hundred and fifty-six fifty-vara lots in the City of San Francisco, under a pretended grant from Manuel Castro, dated December 5th, 1845—not by order of the Governor, but by Castro himself, in virtue of the seventy-seventh Article of the law of March 20th, 1837! This claim was also rejected by the Commission, but it has recently been galvanized into apparent vitality by a decision of the United States District Court.

We believe this claim utterly spurious, and that there is not a disinterested person in California, acquainted with genuine grants, who would not, at first sight, pronounce the Sherback papers fraudulent; the fraud is patent upon their face—so plain, that "he that runs may read."

But admitting, for the sake of the argument, that these papers are genuine, and entirely above suspicion: the construction of the law of 1837 in favor of the power of Prefects to grant pueblo lands in private ownership, and in unlimited quantities, as derived from usage and custom in California, is based, so far as the records of the Land Commission and the United States District Court show, upon this single grant, and upon this only! One single grant in all California, during nearly ten years from the passage of the law to the American conquest! Were all the different Prefects of the several Districts of California asleep during this long period of ten years, that they did not discover their rights and power to grant lands? Was Manuel Castro alone awake, and possessed of sufficient sense

to understand and correctly construe this law? It seems so. Fortunately, however, as soon as he had signed this paper for his friend Peter, he relapsed into the same Rip Van Winkle slumber as his brother Prefects; otherwise the whole Pueblo of San Francisco would now be plastered over with Prefect grants. This great effort seems to have exhausted nearly all the sovereign powers with which the law of 1837 had clothed him!

Another view of this case, which seems to have been entirely overlooked by the District Court, is, that if this was pueblo land, and as such was granted to Sherback under the law of 1837, the Court had no jurisdiction under the law of 1851. The words of that law are too plain to require comment.

But it may be said, will not the same rule hold with respect to grants by the Governor within pueblo limits? If such grants were made prior to the formation of the pueblo, the lands so granted did not become pueblo property, and the law of 1851 gave to the Commissioners and United States Court, jurisdiction over them. The same may be said of grants made by the Governor of land partly within and partly without pueblo limits, after its formation. The Act requires their presentation to the Commission; and if finally confirmed, patents were to issue; but we think such patents, for any land within the pueblo limits, will be of no avail against the pueblo if illegally made, that is, made without the consent of the pueblo authorities, and contrary to the objects of their original dedication. We are of opinion that grants by the Governor, entirely within the pueblo limits, were not, by the law of 1851, within the jurisdiction of the Commission or Courts.

Again, it may be said, that inasmuch as the Prefect was an officer of the Mexican Government, his acts must be *presumed* to have been by competent authority, till the contrary is shown. But the rule of presumption does not apply to this case, for the granting of pueblo lands in private ownership was not assigned by law to the

Prefect, nor was it within the sphere of his accustomed duties. The fact of his making the grant was, therefore, no more *prima facie* evidence of his power to make it, than if an Alcalde of San Francisco had granted a rancho of eleven leagues on the Sacramento river. In order to give any foundation for the doctrine of presumption, it was necessary to first show that the law had made it his duty to issue such grants, and this was attempted to be deduced from the law of 1837; with what success, we have already shown.

We must not be understood as denying any power in the Prefect over Ayuntamientos, or over the granting of pueblo lands by the Ayuntamiento. The laws gave him a certain supervisory control over *all* the acts of that body, and he was the organ of communication between it and the Governor. But he was not an officer of the municipality, and had no power, himself, to grant either municipal or other lands. The laws gave him none. Nor, in point of fact, did any Prefect in California ever claim or exercise such powers.

The idea that Prefects were empowered by the law of 1837 to grant, or to authorize others to grant, in private ownership, the lands of a pueblo, originated in the great "Colton Grant project" of 1850, of which the early residents of San Francisco have a pretty distinct recollection! It is said that Colton, in his flight, left behind him a sufficient number of deeds, executed in blank, to cover every ungranted lot in this city! How desirable, then, to establish a principle of law which would give vitality to what are called "Colton grants!"

The foregoing remarks on the Sherback claim are based entirely upon the case as decided by the Court; and no allusion is made to the new evidence of its fraudulent character, set forth in the application for a rehearing. Supposing that none of the statements there made should be established, we are certain that the claim ought to be, and we believe that in the Supreme Court it will be, rejected, for want of power in the Prefect to make such a grant.